

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1143

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76 - 1143

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

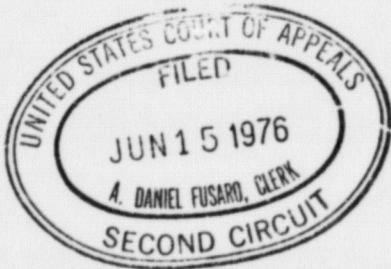
-against-

CHARLES D. ERB and FRANKLIN
S. DE BOER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' JOINT APPENDIX



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DOCKET ENTRIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
THE UNITED STATES,

vs.

JUDGE BRIEANT

74 Crim. 818

CHARLES D. ERB and FRANKLIN
S. DeBOER,

Defendants.

-----X

Proceedings

8-19-74

Filed Indictment.

9- 3-74

Deft. CHARLES D. ERB present (Atty. Present)
pleads not guilty, 10 days for motions. Bail
fixed by court at \$5,000 Personal recognizance
bond. Bail limits to extend the Continental
U.S. Deft. to notify U.S. Atty. 10 days in
advance before leaving country. Deft. to be
Fingerprinted and photographed. Connor, J.

Deft. FRANKLIN S. DeBOER present (Atty. Present)
pleads not guilty. Bail fixed by court at
\$5,000 Personal recognizance bond. Bail limits
to extend the Continental U.S. Deft. to notify
U.S. Atty. 10 days in advance before leaving
country. Deft. to be Fingerprinted and photo-
graphed. Connor, J. Case assigned to Brieant,
J. for all purposes.

9- 3-74

CHARLES D. ERB - Filed Deft's Personal Recogni-
zance Bond without Security for the sum of
\$5,000.00.

9- 3-74 FRANKLIN S. DeBOER - Filed Deft's Personal Recognizance Bond without Security for the sum of \$5,000.00.

1- 8-75 Filed Pltff's Notice of Readiness for Trial on or after 2-1-75.

1- 9-75 FRANKLIN S. DeBOER - Filed Deft's Notice of Motion dismissing Counts 6 through 9, striking certain prejudicial surplusage from the indictment, etc.

1- 9-75 FRANKLIN S. DeBOER - Filed Deft's Memorandum of Law in support of pre-trial motions.

1-13-75 CHARLES D. ERB - Filed Notice of Motion that the Deft joins in the motion herein made on behalf of the Deft. FRANKLIN S. DEBOER insofar as it relates to the counts of the indictment in which he is designated as a defendant.

1-21-75 BOTH DEFT'S - Filed pltff's memorandum in opposition to Deft's motion to dismiss counts six through eight.

1-23-75 BOTH DEFT'S - Filed MEMORANDUM AND ORDER in reference to Deft's Notice of Motion to dismiss Counts 6 through 8, etc., filed 1-9-75 and 1-13-75. Motions are DENIED. SO ORDERED - BRIEANT, J.

3- 3-75 BOTH DEFT'S - Filed pltff's Bill of Particulars.

3-17-75 BOTH DEFT'S - Filed pltff's supplemental Bill of Particulars.

3-31-75 BOTH DEFT'S - Filed pltff's Supplemental Bill of Particulars.

4-22-75 Filed Government's proposed examination of Prospective jurors.

4-21-75 Jury trial begun as to both defendants.

4-22-75 Trial cont'd.

4-23-75 " "

4-24-75 " "

4-25-75 " "

4-28-75 " "

4-29-75 " "

4-30-75 Trial cont'd. Counts 1 and 11 as to both defts. Court directs an entry of Judgment of Acquittal pursuant to Rule 29 of F.R.Cr.P. Count 9 is dismissed as to both defendants on motion of defense counsel with consent of Gov't.

5- 1-75 Trial Cont'd.

5- 1-75 CHARLES D. ERB - Filed deft's Request to Charge.

5- 1-75 " " " - Filed Deft's Supplemental Request to Charge.

5- 1-75 FRANKLIN S. DeBOER - Filed Deft's Request to Charge.

5- 1-75 GOVERNMENT - Filed plttf s Requests to Charge.

5- 2-75 Trial cont'd. & Concluded. JURY VERDICT: DEFT ERB - GUILTY ON COUNTS 2, 3, 4, 5, 10, 12, 14, 15 & 16. DEFT DeBOER - GUILTY ON COUNT 2. NOT GUILTY ON COUNTS 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15 & 16. BOTH DEFT's - Bail cont'd P.S.I. Ordered. Sent adj'd to 6-13-75. 10 days for motions - BRIEANT, J.

BOTH DEFT'S - It is hereby ordered that the time for the Defts to file post-verdict motions, pursuant to Rules 29, 33 and 34 of the Federal Rules

of Criminal Procedure, is enlarged and extended until June 3, 1975. SO ORDERED - BRIEANT, J.

(illegible)

Filed pltff's Memorandum of Law.

"

Filed pltff's Memorandum of Law on False Exculpatory Statements.

"

Franklin S. DeBOER - Filed Deft's Memorandum of Law.

"

CHARLES D. ERB - Filed Deft's Affdvt. & Notice of Motion for an order pursuant to Rule 29 of the F.R.Cr.P. granting judgment of Acquittal after the discharge of the jury herein.

"

FRANKLIN S. DEBOER - Filed Deft's Notice of Motion for an order granting a judgment of acquittal, pursuant to Rule 29(c) of the F.R.Cr.P.

"

FRANKLIN S. DeBOER - Filed Deft's Memorandum of Law.

"

CHARLES D. ERB - Filed Govt's Memorandum of Law in opposition to Deft's motion pursuant to Rule 29.

"

CHARLES D. ERB - Filed CJA-23, Deft's Financial Affdvt.

"

DeBoer - Filed deft's Supple. Reply to the opposition of the Govt to deft's motion for a judgment of acquittal.

"

DeBoer - Filed Govt's Reply Memorandum to post trial motion by Deft. De Boer.

"

Filed transcript of record of proceedings, dated April 21, 22, 23, 24, 25 & 28, 1975.

"

Filed transcript of record of proceedings, dated April 29, 30, 1975 & May 1, 2, 1975.

9- 5-75 BOTH DEFT'S - Filed MEMORANDUM AND ORDER #43037 in reference to Deft's notice of Motion for an order granting a judgment of acquittal filed June 2, & 3rd, 1975. The Motions are DENIED - SO ORDERED - BRIEANT, J.

9- 8-75 FRANKLIN S. DeBOER - Filed Deft's Reply Memorandum.

9- 8-75 Filed Govt' Memorandum of Law in opposition to Deft. DeBoer's motion pursuant to Rule 29(c).

11- 2-75 F.S. DeBOER - Filed Deft's Notice of motion for an order granting deft. a new trial. . . .ret. dtd not given. . .

11-26-75 CHARLES S. ERB - Filed Deft's Notice of Motion for an Order for a new trial.

11-26-75 Filed Govt's Affdvt by L. Green dtd 11-25-75.

11-26-75 Filed Govt's Affdvt. by J. Jupiter dtd 11-25-75.

11-26-75 Filed Govt's Affdvt. J. A. Lowe in opposition to deft's new trial motion.

11-26-75 Filed Govt's affdvt. F E. Wohl, in opposition to deft's new trial motion.

11-26-75 ERB - Filed Govt's Memo of Law in opposition to deft's motion for a new trial.

11-26-75 ERB - Filed Affdvt. of Scott D. Skillern dated 9-20-75.

11-16-75 ERB - Filed Deft's Memo of Law in support of deft's motion for new trial.

2-10-76 Erb & DeBoer - Fld Memorandum & Order #43869. . . Conclusions. . .The motions are in all respects denied. . .So Ordered. . .Brieant, J.

3-11-76

CHARLES D. ERB - Filed Judgment & Probation/
Commitment Order - The deft. is hereby committed to the custody of the Atty General for imprisonment for a period of EIGHTEEN (18) MONTHS on COUNTS 2, 3, 4, 5, 12, 13, 14, 15 & 16, to run CONCURRENTLY with each other. Imposition of sentence on COUNT #10 is suspended. Deft. is placed on Probation for a period of THIRTY-ONE (31) MONTHS, subject to the standing probation order of this court. Special condition of probation being that the Deft not deal in any publicly traded securities without first obtaining permission of his probation officer. Deft. is continued on his present bail until March 15, 1976 at 5 p.m. at which time Deft is to have posted bail pending appeal fixed in the amount of \$5,000.00 Unsecured Personal Recognizance Bond. . .BRIEANT, J. (Jud. Ent. 3-17-76)

3-11-76

FRANKLIN S. DeBOER - Filed Judgment and Probation/
Commitment Order - The Deft is hereby committed to the custody of the Atty General for imprisonment for a period of THREE (3) YEARS on COUNT #2 pursuant to Section 3651 of Title 18, U.S. Code, with provision Deft be confined in a jail type institution for a period of FIVE (5) MONTHS as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and the Deft is placed on Probation for a period of THIRTY-ONE (31) MONTHS, to commence upon expiration of confinement, subject to the standing probation order of this Court. Deft is FINED \$5,000.00 on COUNT #2. Special conditions of Probation being that the Deft pay the fine and not deal in any publicly traded securities without first obtaining permission of his Probation Officer. Deft. continued on present bail until March 15, 1976 at 5 p.m. at which time Deft is to have posted bail pending appeal in the amount of \$5,000.00 Unsecured Personal Recognizance Bond. . .BRIEANT, J.

3-19-76 F.S. DeBOER - Filed Gov't Notice of Motion to
require deposit of fines or posting of Bond
pending appeal.

3-22-76 CHARLES ERB - Filed Deft's Notice of Appeal from
the sentence rendered on 3-11-76. (Copies to
AUSA & DEFT 3-24-75)

3-22-76 FRANKLIN S. DeBOER - Filed Deft's Notice of Appeal
from the judgment of conviction entered on 3-11-76.
(Copies to AUSA & Deft 3-24-76)

4- 6-76 Filed Gov't sentencing Memo.

4- 6-76 Filed Gov't sentencing Memo.

4- 6-76 Filed Deft sentencing memo. De Boer

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-v-

No. 74 Cr. 818

CHARLES D. ERB and FRANKLIN S.
DeBOER,

Defendants.

-----X

The Grand Jury charges:

1. From on or about March 1, 1969 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, CHARLES D. ERB and FRANKLIN S. DeBOER, the defendants, and George C. Van Aken, named herein as a co-conspirator but not as a defendant, and other persons to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, to defraud the United States and to commit certain offenses against the United States, to wit, filing of false registration statements in violation of Title 15, United States Code, Section 77x, submitting false documents to a United States government agency, in violation of Title 18, United States

Code, Section 1001; securities fraud in violation of Title 15, United States Code, Sections 77e(b)(1), 77j, 77q(a) and 77x; and mail fraud in violation of Title 18, United States Code, Section 1341.

2. It was a part of said conspiracy that said defendants and co-conspirators unlawfully, wilfully and knowingly would make and cause to be made, in registration statements filed with the United States Securities and Exchange Commission, under the Securities Act of 1933 (Title 15, United States Code, Subchapter 2A), untrue statements of material facts, and would omit to state material facts required to be stated in said registration statements and necessary to make the statements in said registration statements not misleading.

3. It was further a part of said conspiracy that said defendants and co-conspirators, in a matter within the jurisdiction of the United States Securities and Exchange Commission would unlawfully, wilfully and knowingly make and cause to be made and use and cause to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries.

4. It was further a part of said conspiracy that said defendants and co-conspirators, having devised and intending

to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, unlawfully, wilfully and knowingly, and for the purpose of executing said scheme and artifice and attempting so to do, would place and cause to be placed in post offices and authorized depositories for mail matter, and would cause to be delivered by mail according to the direction thereon, certain matter to be sent and delivered by the United States Postal Service.

5. It was further a part of said conspiracy that said defendants and co-conspirators would make use of means and instruments of transportation and communication in interstate commerce and the mails to carry and transmit prospectuses relating to a security, to wit, the common stock of Xprint Corporation, with respect to which a registration statement had been filed under the Securities Act of 1933, Title 15, United States Code, Subchapter 2A, which prospectuses did not meet the requirements of Title 15, United States Code, Section 77j, in that said prospectuses failed to disclose all compensation to underwriters in connection with the public offering to which said prospectuses related.

6. It was further a part of said conspiracy that

said defendants and co-conspirators unlawfully, wilfully and knowingly, in the offer and sale of the common stock of Xprint Corporation by the use of means and instruments of transportation and communications in interstate commerce and by use of the mails, would directly and indirectly (a) employ devices, schemes and artifices to defraud; (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; and (c) engage in transactions, practices and courses of business which operated and would operate as a fraud and deceit upon the purchasers of the common stock of Xprint Corporation.

Means of the Conspiracy

7. Among the means by which the defendants and co-conspirators would and did carry out the said conspiracy were the following:

(a) During 1969 FRANKLIN S. DeBOER and CHARLES D ERB, the defendants, and co-conspirator George C. Van Aken were partners in the brokerage firm of Baerwald and DeBoer.

(b) During 1969 Baerwald and DeBoer agreed to

be the underwriter of a proposed public offering of shares of the common stock of Xprint Corporation.

(c) In or about April, 1969, and prior to the public offering of the common stock of Xprint Corporation, defendant FRANKLIN S. DeBOER bought 5000 shares of the common stock of Xprint Corporation, and concealed his ownership of said 5000 shares by arranging to have said shares falsely and fraudulently issued in the name of James Lovelett, when in truth and in fact said shares were owned by defendant FRANKLIN S. DeBOER.

(d) In or about April, 1969, and prior to the public offering of the common stock of Xprint Corporation, defendant CHARLES D. ERB caused the purchase of 50,000 shares of the common stock of Xprint Corporation, and concealed his ownership of, and beneficial interest in, a portion of said 50,000 shares by arranging to have all of said shares falsely and fraudulently issued in the name of Scott Skillern, when in truth and in fact defendant CHARLES D. ERB owned and had a beneficial interest in a substantial portion of said 50,000 shares.

(e) On or about June 10, 1969, defendant FRANKLIN S. DeBOER caused the signature of James Lovelett to be signed

by a person other than James Lovelett on a letter falsely and fraudulently representing James Lovelett to be the owner of 5,000 shares of the common stock of Xprint Corporation when in truth and in fact said shares were owned by defendant FRANKLIN S. DeBOER.

(f) In or about June, 1969, defendant CHARLES D. ERB arranged for Scott Skillern to sign a letter falsely and fraudulently representing that Scott Skillern was the sole owner of 50,000 shares of the common stock of Xprint Corporation when in truth and in fact defendant CHARLES D. ERB owned and had a beneficial interest in a substantial portion of said 50,000 shares.

(g) On or about August 20, 1969 and December 3, 12 and 19, 1969 defendants CHARLES D. ERB and FRANKLIN S. DeBOER and co-conspirator George C. Van Aken caused to be filed with the United States Securities and Exchange Commission, a registration statement and amended registration statements relating to a proposed public offering of the common stock of Xprint Corporation. Said registration statements contained untrue statements, and omissions to state material facts as follows:

(1) Each of said registration statements and

amended registration statements failed to disclose, among other things, that defendants CHARLES D. ERB and FRANKLIN S. DeBOER owned and had beneficial interests in a substantial number of shares of the common stock of Xprint Corporation.

(2) Each of said registration statements and amended registration statements also falsely and fraudulently represented, among other things, that James Lovelett owned 5,000 shares of the common stock of Xprint Corporation, when in truth and in fact said 5000 shares were owned by defendant FRANKLIN S. DeBOER.

(3) The registration statement filed on or about August 20, 1969 and the amended registration statement filed on or about December 3, 1969 also falsely and fraudulently represented, among other things, that Scott Skillern owned 50,000 shares of the common stock of Xprint Corporation, when in truth and in fact defendant CHARLES D. ERB owned and had a beneficial interest in a substantial portion of said shares.

(4) Said omissions and false and fraudulent misrepresentations were material in that, among other things, they would allow said defendants and co-conspirator to offer shares of common stock of Xprint Corporation to the investing

public, while concealing from said prospective investors and others that said defendants and co-conspirator would, as a result of said offering, receive undisclosed underwriting compensation in the form of shares of stock bought by said defendants and co-conspirator prior to the underwriting at prices substantially below the prices at which said shares would be offered to the investing public.

(h) On or about October 14 and December 3 and 12, 1969, defendant FRANKLIN S. DeBOER and co-conspirator George C. Van Aken caused letters forged in the name of James Lovelett to be filed with the United States Securities and Exchange Commission, said letters falsely and fraudulently representing James Lovelett to be an investor and stockholder in Xprint Corporation.

(i) From on or about April 2, 1969 through on or about January 19, 1970 defendant CHARLES D. ERB and co-conspirator George C. Van Aken communicated to attorneys for Xprint Corporation and to attorneys for Baerwald and DeBoer false statements that among other things, James Lovelett and Scott Skillern were investors in Xprint Corporation, without disclosing that the shares of the common stock of Xprint Corporation issued in the name of James Lovelett were in fact owned

by defendant FRANKLIN S. DeBOER and that defendant CHARLES D. ERB owned and had a beneficial interest in a substantial portion of the shares of the common stock of Xprint Corporation issued in the name of Scott Skillern. Defendant CHARLES D. ERB and co-conspirator George C. Van Aken communicated said false and misleading information with the purpose and knowledge that said attorneys would communicate such information to the United States Securities and Exchange Commission and the National Association of Securities Dealers and with the purpose of defrauding, among others, said attorneys, the United States Securities and Exchange Commission, the National Association of Securities Dealers and prospective buyers of the common stock of Xprint Corporation.

(j) On or about December 23, 1969 defendants CHARLES D. ERB and FRANKLIN S. DeBOER and co-conspirator George C. Van Aken caused to be distributed to the investing public over six hundred copies of prospectuses relating to the public offering of the common stock of Xprint Corporation, which prospectuses failed to disclose, among other things, that defendants CHARLES D. ERB and FRANKLIN S. DeBOER and co-conspirator George C. Van Aken owned a substantial number of shares of the common stock of Xprint Corporation. Said prospectuses also falsely and

fraudulently represented that James Lovelett owned 5000 shares of the common stock of Xprint Corporation when in truth and in fact said 5,000 shares were owned by defendant FRANKLIN S. DeBOER.

Overt Acts

In furtherance of said conspiracy, and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about April 2, 1969 defendant CHARLES D. ERB, co-conspirator George C. Van Aken and others had a meeting.
2. On or about April 22, 1969 defendant FRANKLIN S. DeBOER signed a check in the amount of \$10,000.
3. On or about October 8, 1969 defendant CHARLES D. ERB had a telephone conversation.
4. On or about December 8, 1969 defendant CHARLES D. ERB signed a letter to the United States Securities and Exchange Commission.

(Title 18, United States Code,
Section 371).

COUNTS TWO THROUGH FIVE

The Grand Jury further charges:

1. On or about the dates hereinafter set forth in Counts Two through Five, in the Southern District of New York, CHARLES D. ERB and FRANKLIN S. DeBOER, the defendants, did unlawfully, wilfully and knowingly, in registration statements concerning a proposed public offering of shares of the common stock of Xprint Corporation, filed under the Securities Act of 1933, Title 15, United States Code, Subchapter 2A, make and cause to be made untrue statements of material facts, and omit and cause to be omitted to state material facts required to be stated in said registration statements and necessary to make the statements in said registration statements not misleading.

2. On or about the dates hereinafter set forth in this paragraph, registration statements concerning a proposed public offering of shares of the common stock of Xprint Corporation were filed with the United States Securities and Exchange Commission:

<u>COUNT</u>	<u>DATE</u>	<u>REGISTRATION STATEMENT</u>
2	August 20, 1969	Form 3-2 Registration Statement under the Securities Act of 1933.
3	December 3, 1969	Amendment No. 1 for Form 3-2 Registration Statement under the Securities Act of 1933.

<u>COUNT</u>	<u>DATE</u>	<u>REGISTRATION STATEMENT</u>
4	December 12, 1969	Amendment No. 2 to Form S-2 Registration Statement under the Securities Act of 1933.
5	December 19, 1969	Amendment No. 3 to Form S-2 Registration Statement under the Securities Act of 1933.

3. The said defendants did omit and cause to be omitted in said registration statements material facts, to wit, among other things, that defendant FRANKLIN S. DeBOER owned a substantial number of shares of the common stock of Xprint Corporation and did make and cause to be made in said registration statements untrue statements of material facts, to wit, among other things, that James Lovelett owned 5,000 shares of the common stock of Xprint Corporation.

4. Defendant CHARLES D. ERB did omit and cause to be omitted in said registration statements material facts, to wit, among other things, that defendant CHARLES D. ERB owned, and had a beneficial interest in, a substantial number of shares of the common stock of Xprint Corporation, and did make and cause to be made in the registration statements alleged in Counts Two and Three of this Indictment untrue statements of material facts, to wit, among other things, that Scott

Skillern owned 50,000 shares of the common stock of Xprint Corporation.

5. The allegations contained in paragraph 7 of Count One of this Indictment are repeated and realleged as though fully set forth herein as constituting and describing some of the means by which said defendants committed the offenses charged in Counts Two through Five.

6. It was material to prospective purchasers of the common stock of Xprint Corporation to know of all compensation which any partner or former partner of the underwriter of said public offering would receive directly and indirectly as a result of said public offering including any holdings of, and beneficial interest in, any shares of the common stock of Xprint Corporation of any partner or former partner of the underwriter of said public offering.

7. It was material to the action of the United States Securities and Exchange Commission concerning said registration statements to ascertain the true facts and circumstances concerning any direct and indirect ownership of, and beneficial interest in, any shares of the common stock of Xprint Corporation of any partner or former partner of the underwriter of

the proposed public offering of the common stock of Xprint Corporation.

(Title 15, United States Code, Section 77x;
Title 18, United States Code, Section 2.)

COUNT SIX

The Grand Jury further charges:

1. On or about October 14, 1969, FRANKLIN S. DeBOER, the defendant, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit, the United States Securities and Exchange Commission, did unlawfully, wilfully and knowingly, make and cause to be made, and use and cause to be used, a false writing and document, to wit, a letter a copy of which is annexed hereto as Exhibit 1 and incorporated herein, knowing the same to contain false, fictitious and fraudulent statements and entries.

2. Said letter was a false writing and document in that it purported to bear the signature of James Lovelett when in truth and in fact the signature thereon was not that of James Lovelett, and in that it falsely represented that James Lovelett was an investor and stockholder in Xprint Corporation when in truth and in fact James Lovelett was not such an investor

and stockholder.

(Title 18, United States Code, Sections 1001 and 2).

COUNT SEVEN

The Grand Jury further charges:

1. On or about December 3, 1969, FRANKLIN S. DeBOER, the defendant, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit, the United States Securities and Exchange Commission, did unlawfully, wilfully and knowingly, make and cause to be made, and use and cause to be used, a false writing and document, to wit, a letter a copy of which is annexed hereto as Exhibit 2 and incorporated herein, knowing the same to contain false, fictitious and fraudulent statements and entries.

2. Said letter was a false writing and document in that it purported to bear the signature of James Lovelett when in truth and in fact the signature thereon was not that of James Lovelett, and in that it falsely represented that James Lovelett was an investor and stockholder in Xprint Corporation when in truth and in fact James Lovelett was not such an investor and stockholder.

(Title 18, United States Code, Section 1001 and 2).

COUNT EIGHT

The Grand Jury further charges:

1. On or about December 12, 1969, FRANKLIN S. De BOER, the defendant, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit, the United States Securities and Exchange Commission, did unlawfully, wilfully and knowingly make and cause to be made, and use and cause to be used, a false writing and document, to wit, a letter a copy of which is annexed hereto as Exhibit 3 and incorporated herein, knowing the same to contain false, fictitious and fraudulent statements and entries.

.. Said letter was a false writing and document in that it purported to bear the signature of James Lovelett when in truth and in fact the signature thereon was not that of James Lovelett, and in that it falsely represented that James Lovelett was an investor and stockholder in Xprint Corporation when in truth and in fact James Lovelett was not such an investor and stockholder.

(Title 28, United States Code, Sections 1001 and 2).

COUNTS NINE THROUGH TWELVE

The Grand Jury further charges:

1. On or about the dates hereinafter set forth in Counts Nine through Twelve, in the Southern District of New York, CHARLES D. ERB and FRANKLIN S. DeBOER, the defendants, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud the United States Securities and Exchange Commission, the National Association of Securities Dealers and the prospective purchasers of the common stock of Xprint Corporation to obtain money and property from said purchasers by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing said scheme and artifice to defraud and attempting so to do, did cause to be placed in post offices and authorized depositories for mail matter and did cause to be delivered by mail, according to the directions thereon, certain matter to be sent and delivered by the United States Postal Service, as more particularly set forth below.

2. The allegations contained in Paragraph 7 of Count One of this Indictment are repeated and realleged as though fully set forth herein as constituting and describing some of the means by which said defendants committed the offenses charged in Counts Nine through Thirteen herein.

3. On or about the dates hereinafter set forth, in Counts Nine through Thirteen, in the Southern District of New

York, said defendants unlawfully, wilfully and knowingly did cause to be placed in post offices and authorized depositories for mail and did cause to be delivered by mail by the United States Postal Service according to the directions thereon, to the addresses hereinafter set forth the matter hereinafter set forth:

<u>COUNT .</u>	<u>DATE</u>	<u>ADDRESSEE</u>	<u>MATTER</u>
9	September 24, 1969	Robert S. Fischer, Esq.	Letter
10	October 2, 1969	Mr. Timothy Bennett	Letter and en-National Association closure. of Securities Dealers
11	October 9, 1969	Robert S. Fischer, Esq.	Letter
12	October 10, 1969	Mr. Timothy Bennett	Letter and en-National Association closure of Securities Dealers

(Title 18, United States Code, Sections 1341 and 2).

COUNTS THIRTEEN THROUGH SIXTEEN

The Grand Jury further charges:

1. In or about December, 1969 in the Southern District of New York, CHARLES D. ERB and FRANKLIN S. DeBOER, the defendants, unlawfully, wilfully and knowingly did make use of means and instrumentalities of interstate commerce and the mails

to carry and transmit prospectuses relating to a security, to wit, the common stock of Xprint Corporation, with respect to which a registration statement was filed under the Securities Act of 1933, Title 15, United States Code, Subchapter 2A, which prospectuses did not meet the requirements of the Securities Act of 1933, Title 15, United States Code, Section 77j and the rules and regulations of the United States Securities and Exchange Commission, in that, said prospectuses failed to disclose, among other things, all compensation directly and indirectly to be paid to the underwriter and partners and former partners of the underwriter in connection with the proposed public offering of the common stock of Xprint Corporation.

2. The allegations contained in paragraph 7 of Count One of this Indictment are repeated and realleged as though fully set forth herein, as constituting and describing some of the means by which said defendant committed the offenses charged in Counts Thirteen through Sixteen.

3. In or about December 1969, in the Southern District of New York, said defendants unlawfully, wilfully and knowingly did use and cause to be used means and instrumentalities of interstate commerce and the mails by sending and causing to

be sent to the addressees hereinafter set forth prospectuses relating to the common stock of Xprint Corporation:

<u>COUNT</u>	<u>ADDRESSEE</u>
13	Jack Pollack
14	Paul F. Lardi
15	Howard Morgenbesser
16	Harvey B. Loomis

(Title 15, United States Code, sections 77e(b) and 77j; Title 18, United States Code, Section 2).

Foreman

PAUL J. CURRAN
United States Attorney

EXHIBIT "1" OF INDICTMENT

JAMES LOVELETT
2473 Post Road
Southport, Connecticut

RECD-S.E.C.
OCT 14 1969

October 13, 1969

Securities and Exchange Commission
500 North Capital Street, N.W.
Washington, D.C. 20549

Re: Xprint Corporation
Registration Statement on Form S-2
(File No. 2-34361)

Dear Sirs:

At the request of Xprint Corporation, I am writing you concerning the proposed offering by me of 2500 shares of Common Stock of the Corporation. The shares are included in the Registration Statement on Form S-2 (File No. 2-34361) which was filed with you on August 20, 1969 by the Corporation

The reason for my sale of these shares at this time is that I wish to recoup the investment which I initially made in the Company in April of 1969. At the time I made this investment it was with the understanding that if the Company made a public offering of its securities I would be entitled to register up to one-half of the shares I purchased from it for sale, but that I would hold the remaining shares for investment.

I have read and am familiar with the Registration Statement, as filed with you. I know of no material adverse information with regard to current or prospective operations of the Company which has not been disclosed in the Prospective contained as a part of the Registration Statement.

Very truly yours,

/s/ James Lovelett

EXHIBIT "2" OF INDICTMENT

JAMES LOVELETT
2473 Post Road
Southport, Connecticut

November 3, 1969

Securities and Exchange Commission
500 North Capital Street, N.W
Washington, D.C. 20549

Re: XPrint Corporation
Registration Statement on Form S-2
(File No. 2-34361)

Dear Sirs:

At the request of Xprint Corporation, I am writing you concerning the proposed offering by me of 2,500 shares of common stock of the corporation. The shares are included in the Registration Statement on Form S-2 (Filed No. 2-34361) which was filed with you on August 20, 1969 by the corporation.

The reason for my sale of these shares at this time is that I wish to recoup the investment which I initially made in the company in April of 1969. At the time I made this investment it was with the understanding that if the company made a public offering of its securities, I would be entitled to register up to one-half of the shares I purchased from it for sale, but that I would hold the remaining shares for investment.

I have read and am familiar with the Registration Statement, as filed with you. I know of no material adverse information with regard to current or prospective operations of the company which has not been disclosed in the prospective contained as a part of the Registration Statement.

Very truly yours,

/s/ James Lovelett

EXHIBIT "3" OF INDICTMENT

Securities and Exchange Commission
500 North Capital Street, N.W.
Washington, D.C. 20549

Re: Xprint Corporation -
Registration Statement No. 2-34361

Dear Sirs:

As a selling stockholder in the public offering referred to in the above Registration Statement, I hereby request acceleration of the effectiveness of the Registration Statement to December 10, 1969.

Very truly yours,

/s/ James Lovelett
James Lovelett

Dr. Skillern: "Now. Now this could be just temporary. It doesn't make any difference if it is in your thing 60 days or 90 days we can still wing it and deal it. We can still hold it.

Mr. Erb: "Well what I would like to do is kinda leave that there, maybe leave that money there, make you a limited partner at the year and we'll pay your loan off out there through Xprint."

Dr. Skillern: "Yeah, Now you're talking. Pay off the damn thing. And then what we can do is establish some false sales to shore up these debts. Now you're on the ball. That's what I want you to do. Really That's good.."

Mr. Erb: "I'm going to really, Scott. To make your Academic Systems and Management investment and other stock worth something.

Dr. Skillern: "Really that's good. Fine. We've finally got the ball game going. Let's get it going now. That's what we want to do. We're got you stimulated and I knew someday . . . don't you wish. . . now here's the thing, we're got to build up that account of mine because I won't be useful to your guys and some time a deal like this may come along again and I can't shove money over to you because I won't have any assets. We can build them up this way. Thank heavens for . . ."

Mr. Erb: "You've all ready done enough for me, Scott. I'm in good shape. I'm eating supper now.."

Dr. Skillern: "Thank heavens we got this . . . Oh, are you eating supper, gee I'm . . ."

Mr. Erb: "I'm sitting here with Wilda; Wilda is over . . . and I'm sitting here eating and talking to you and watching TV."

Dr. Skillern: "Because this is the thing I've been wanting to do is stimulate you to get this damn debt off and everything else and the Xprint will go out and any new deal that you got that's good. . . "

Mr. Erb: "You know how much you're registered for in Xprint, don't you?"

Dr. Skillern: "Twenty"

Mr. Erb: "Well, it's in the prospectus Dr. Skillern. Yeah Did you read it?"

Dr. Skillern: "No. I didn't read my name."

Mr. Erb: "Well your name is already in there and you're registering stock."

Dr. Skillern: "I'm the damndest guy. I never read my name through the whole thing. I saw Bert Knight bought some at 2 dollars a share. You know I read . . . "

Mr. Erb: "You didn't buy any at two bucks." You didn't buy any at two bucks

Dr. Skillern: "No, I didn't any at two bucks. I didn't know I was registered."

I'll read that Xprint thoroughly again. I missed my name.

Mr. Erb: You're registering stock.

Dr. Skillern: I'll be damned. I didn't see it in the registry. That's good. That's good just shore me up because here's the thing, if we can get me up to about 150 grand. Do you think you can do it in two months. See the days are closing near. Two whole months."

Mr. Erb: Ooooh, I think probably in that You know, Scotty, If the Academic Systems and Management works out you're golden

Dr. Skillern: "What is that worth then?"

Mr. Erb: Well, you'll probably do taken on the combined package at about 15 bucks.

Dr. Skillern: "Oh, no."

Mr. Erb: "Yes."

JAL:par-8

Dr. Skillern: "It won't go up 15 dollars a share."

Mr. Erb: "What's that?"

Dr. Skillern: "Academic Systems."

Mr. Erb: "No, no. The combined package of M. & H. and Academic Systems, and H.E.S."

Dr. Skillern: "H.E.S. I'm not in."

Mr. Erb: "Yeah, but here is the way it works, you get about 10 dollars and well I see . . . The M. & H should be done at about 15 dollars. In other words you buy at 15 dollars.

Dr. Skillern: Yeah Right. Okay so there would be a little loss there. I'll have a 6 grand loss there. Yeah

Mr. Erb: "The Academic Systems and Management he will buy that, all stock, including the letter stock at somewhere right around 8 or 9. . . bucks as I recall ."

Dr. Skillern: You're kidding.

Mr. Erb: "Yeah

Dr. Skillern: "Oh for Heaven Sakes alive"

Mr. Erb: "So you're free and clear" Dr. Skillern:

Dr. Skillern: That's better than 2 you see that alone would help work this thing out"

Mr. Erb: "See what the stock's quoted at today"

Dr. Skillern: "No".

Mr. Erb: "Actually it was 2-1/2 and 2-3/4 today".

Dr. Skillern: "Yes, I see. Of course, nobody knows about this so that is why"

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p.9

Mr. Erb "That is what it is being quoted at though

Dr. Skillern: "That's good, nobody knows about this deal
that't what, you know and actually I'm
holding 1/12th of that floating stock."

Mr. Erb "not in an Academic, you're no.

Dr. Skillern "Uh" uh

Mr. Erb "No"

Dr. Skillern: Isn't there 300,000 shares floating

Mr. Erb: How much?

Dr. Skillern 300,000 - how much Academic floating?

Mr. Erb 400

Dr. Skillern Well, I'm holding 1/16th of it. 1/16th of it.

Mr. Erb But I think we've got this thing worked out
finally that it will work our alright.

Dr. Skillern Then we can gradually seal the darned thing
out and then Oh my God."

Mr. Erb "Now tomorrow morning call in, call in and
we'll work that thing out with Seymour and
I'll take the underwriting. Now if I pick
up . . . Scott suppose I did this, if I
took this underwriting on Thursday and it's
a hot deal. ."

Dr. Skillern Yeah

Mr. ERB I'll maybe take down 1000 shares and put it
thru your account.

p. 10

Dr. Skillern What is the deal.

Mr. Erb If it comes out at 8 I blow it out at 12
what the heck is the difference.

Dr. Skillern That's right

Mr. Erb. Four grand - OK

Dr. Skillern What is the deal, what is the end of it.

Mr. Erb I don't even know. If it's a hot deal I'll
take it if it's cold, you don't get any.

Dr. Skillern Right

Mr. Erb That's the only way we operate.

Dr. Skillern That's right.

Mr. Erb OK

Dr. Skillern Very good.

Mr. Erb So that's what I'll be doing. I'll try and
do that Monday.

Dr. Skillern Now here's the thing too, three other thing,
by the way we got some of the 4000 sold
havn't we of the illicon? How's that doing?

Mr. Erb. Well we sold 3000.

Dr. Skillern Oh, 3000 of the illicon sold.

Mr. Erb. 3000 and I sold that out with a profit of
about 3000 at . . .

Dr. Skillern Here's the way I figure on that roughly
now I'll ask my accountant a question . . . "

Mr. Erb You've got to figure you bought it at $1 \frac{1}{2}$ net, Scott and you sold it out at $2 \frac{3}{8}$.

Dr. Skillern: Right - but you get part of that net back, you see you get 20 ... I think in your tax bracket ... we can check it out Chuck, you get about 22, 23, 24% back. You see the sur-charge socks you, you get 30% back generally speaking but then they put a 10% sur-charge on that profit you make and that takes away 7, you know - we'll figure it out later.

Mr. Erb. Actually Scott I've got you ahead by about $\frac{1}{2}$ point plus $\frac{3}{8}$.

Dr. Skillern. Yes, that's right.

Mr. Erb. I've got Oh, I don't know it would amount to a couple thousand dollars.

Dr. Skillern Yes, that's right, that's what I figure, a couple thousand dollars, you got about 800 or something coming, plus your principal, plus your principal, you see. Now is that what... Here's what you do in other words you just sock that back in my ... whatever you want to do sock it back to my margin account if you want to and do the book work out there.

Mr. Erb Alright.

Dr. Skillern Just keep socking it off my margin out there, see. Now any other deal you've got coming up?

Mr. Erb? Your cash account is plus, you've got 3,000 cash in your cash account. Do you margin account, you're 43,000 in debt.

Dr. Skillern Yeah, but in the margin account keep whiddling that down... Now don't forget any other deal you've got coming up, we can pull that ... you know you get your ... like any other fast trade you get out there in New York from now on you'll get your principal back plus what you need ... you know that deal we had going.

Mr. Erb. Scott, you sent me a \$6,000 check. What's that for?

Dr. Skillern That was for Compucomp. Just rip it up and throw it away now if you want to.

Mr. Erb. Oh Great I don't need any money for Compucomp.

Dr. Skillern: Keep it in drawer. Did you send your 2,000 to me by the way for that bank?

Mr. Erb The girl has your check and I sign it in the morning it will leave and it is good.

Dr. Skillern. Good - cause that's all I'll need this year. But figure out what you make for the rest of this year. In other words, what we've got to do is all avenues of approach in case Xprint doesn't come out, let's try to show^{RE} up these three.

p. 13

Mr. Erb. Well, it will be Xprint, will come out, we're syndicating it now.

Dr. Skillern When's the date?

Mr. Erb. 7 1/2 bucks it will come out we will probably open it pretty close to 12.

Dr. Skillern What's the date on it to come out?

Mr. Erb. The first part of November.

Dr. Skillern. Terrific The reason I say this, is I can tell you the market. The market may go down in another test area the latter part of December. If you come out in November on that thing you are a success. Beautiful

Mr. Erb. I'll tell you what, you should see what the indications of interest are pretty good.

Dr. Skillern Huh?

Mr. Erb And Party-Time is coming out don't forget.

Dr. Skillern Yeah I havn't got any of that. I will have uh.

Mr. Erb Yes, you'll have, you'll have as much as I can unload.

Dr. Skillern Here's the point, if you get any of it put your³ in my name.

Mr. Erb. I will get Party Tyme..

Skillern , put yours in my name and then sell it for the profit and we will figure out your bracket and I'll take the profit off that. You see what I mean?

p. 14

Mr. Erb. Ok.

Dr. Skillern We might as well - put every damn thing in my name but just sell it and just keep it there - keep it there.

Mr. Erb OK

Dr. Skillern Keep it there - don't send the stuff to me just keep it there until we work off the margins stuff - just tell me how you stand. You see what I mean?

Erb. Alright.

Dr. Skillern That is all you need to do - everything you got, it's legal, free and clear. Just put it in my name and just figure and just shore things up pretty soon we will be smelling like roses.

Mr. Erb. Alright I'll work with you on that. Call me back in the morning.

Dr. Skillern I will.

Mr. ERb Talk to Tom Oswald at 9:00 so I can get that daggone thing done.

Dr. Skillern Well listen, is he there at a quarter of 9:00.

Mr. ERb. Yeh, he's there.

Dr. Skillern Well look I'll call him about 9:00 or 9:30 now I've got two derm abrasions they're facial scar removals you know and I'll do and I'll get right on the phone and call Oswald and

tell him to

p. 15

Erb. Put you thorough to Seymour

Skillern put me thru to Seymour?

Skillern: Oswald to Seymour. It sounds let a couple of football players

ERB: Seymour Specter is his name.

Skillern: Let me write those down - Just ask for Oswald - right - "

Mr. Erb: "Just ask for Tom Oswald at the other number You know that.

Dr. Skillern: "What's the other number?"

Mr. Erb: "He gave you the other number."

Dr. Skillern: "No, he said '284' and he quit."

Mr. ERB: "He didn't."

Dr. Skillern: "He did, he quit - He's in the same building though isn't he?"

Mr. Erb: "No, he's over he's over at 80 W . . ."

Dr. Skillern: "Oh, I see - Well I'll just call you in the morning anyway." Emily will get em the number

Mr. Erb: "Alright, I'll get Oswald, in fact I'll tell you what you call me a quarter of 9 - you call me around a quarter after 9 and then I will get you over to Seymour."

Dr. Skillern: "I'll call you a quarter after 9 - I'll call you anywhere from 9 to 10 - give me leeway in case the operations are tough. In case the operations are difficult. All I do is call Seymour and just tell him to transfer the account to

ERB: Peter Rosenthal, Letter of instructions will follow."

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Mr. Erb:

"Then I'll tell Seymour what's up.

Dr. Skillern:

Peter Rosenthal - letter of instruction will follow. Okay

Erb:

And I'll work out the rest. I'll get a letter from Peter. That that's your stuff. OK, I'll talk to you in the morning at 9:15.

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CONVERSATION BETWEEN DR. SCOTT
SKILLERN AND MR. CHARLES ERB
11/22/68

Chuck:

We're playing games with one another. Look the doggone stock Academic Systems and Management, I'm not asking you or I'm telling you, it may go up or it may go down. On its current value on a reverse split will be 4 dollars. That is without a half a million dollars that George and I are putting in on Tuesday. If that stock isn't on a new basis and on a new basis worth well 2 dollars on the new basis and on a reverse split of 4 for 1 ^{worth} ~~with~~ 8 bucks, we might as well all kid ourselves. Now that's what you should be dealing in for when George starts buying stock and he doesn't think of that stock maybe getting to 3 or maybe 2 1/2 and us seeing a 10 dollar stock on the reverse, then we're kidding ourselves. Alright the other thing is this all I pointed out to you when I did this thing is it's one thing to get hold of the shares, you know its the type of thing where I'm taking an allocation of, what have we got, I don't even know how many shares I've got on ~~print~~ print... but if there's 100,000 shares, I got maybe 25,000 of those to place and I say, Scott Skillern is taking 1/5 of those or 5000 shares, that's 5000 times 7.50 or 37,500 bucks, 37,500

bucks of which we'll probably blow 3,000 of it somewhere around between; oh, I would think, 12 and 15 and we'll probably sit with 2000 shares on the market side ad in finitum

I don't know how long we'll let it go because it if goes to twenty five, we'll still sit with it, because I can't give the market too many shares, suppose I get 45,000 out of it, all right there is a difference there of what is that, 7500 dollars which we've taken out of it, maybe I'll blow another 1000 around 20. That gives us about 27,000, you've got a 1000 in the market at no cost and you sit with it. Alright now out of that \$27,500, you've got a \$100,000 loss alright now you take that entire \$27,500 off you're down to \$73,500 loss. Alright now on the 50/50 deal if I take half of that or if I take or any portion of that in essence what has happened here in you're which you giving me a portion of your tax - loss of which ^{you} ~~is~~ still don't physically have the dollars but yet you have chewed up your income tax. Alright, what I have said to you is this, at the initial state we start out this way, you're going to ... you'll do this ... I'll get cash which is good for me and what we do is when we get down to say 50,000 bucks all that happens is that we drop down to 20 percent. I start taking 20 percent then down to 10 percent. Now, this 37,500 dollars that we originally put

into Xprint, that's my dough going in there.
Right?"

Dr. Skillern: "Let's see ..."

Chuck: "Yeah, you don't have 37,500. It's sitting over
in the other place."

Dr. Skillern: "Yeah, I've got 20,000 of it, that's all I know

Erb: Yeah, I know, fine.

Dr. Skillern: But if that's shored up and I got out of there.
I can see what you mean there. Say if we get out,
I can understand that. In other words, it is not
hard to understand. If we can get out \$30,000

Chuck: "We may not want to get out of stock. Why should
we unload hot issues, hot companies good deals
real hot companies to go back and try to cut down
on a situation or stock that has gone down. All
that is going to happen is, sure I can get some
cash. Sure on this Computer Soft ~~Ware~~^{ARE} deal, that
is coming out at 10. We're in the thing with
Newberger Loeb. I ~~expect~~^{expect} that stock to open 15-17
somewhere around there. Okay, if ^I bang the bid, it
won't go up any higher, maybe I have 2000 shares
of that stuff.

Dr. Skillern: Well I see what you mean there.

Chuck: "You can't unload all the stock. I have to place
that stock."

Dr. Skillern: "In other words if Xprint gets us that much then
I can see the 50/50 deal so far along. Let's
put it this way. I don't know I'm trying to be

fair about this thing. Say it is \$150,000 and I'm willing to go 50,000, losers without being able to recoup. You know what I mean just to get the 100, see what I mean.

Chuck: "No, No. . . You don't have to . . . You still aren't with me if you are talking like that. You're not going to sacrifice anything, Scott, the 50,000 you get too. You'll get that 50 g's too. And it is up to us to get it to you. Oh shit, come on

Dr. Skillern: I'm too damn stupid.

Chuck: What? "That's why I had you here telling you that on these things, I've got five underwritings here in December, and I have ten next year. If I can't do well on these, we ought to quit.

Dr. Skillern: "But here's the thing what I'm trying to say. See just for round numbers we get 150,000 loss. If we didn't get the ~~X~~print off, you say, 'Scott, let's go 50/50 on the tax business, you know on the profits. That would mean . . .

Chuck: "All I'm doing here, Scott, is this, I'm using your tax loss to get ⁴⁵~~40~~ bucks, dollars. And I'm using my money to do it.

Mr. Erb: Are you in the office now

Dr. Skillern Right

Dr. Skillern "Now. In so doing, though, if we went 150,000 at a 50 percent deal, I would be in a sense not being able to recoup 75,000 then.

Chuck: "No, that's still not right. Because we aren't going to do it that way the entire time.

Skillern: "Okay, I see what you mean."

Chuck: "As you start to, you see what you've done is taken a paper loss as being your real loss.

Skillern: Right."

Chuck: "And see all I'm doing is saying 'Okay, Scott. Academic Systems and Management is always going to be one. Let's take your loss as a loss and let's do this hanky pank with the checks, and we'll go ahead and do this thing. I'll go ahead and do that thing -- establish your loss or with the idea that Erb's going to get back bucks. But, the thing that you're forgetting here is Academic gets better because of our flooding this amount of dough into them, your situation is going to be less critical. In other words, you'll still have the tax loss but your real loss won't be near as great because the situations are improving. Alright.

Skillern: Yes, What would I do, establish a buy again. Just a fictitious check to establish a buy again?

Erb: No - Ah, just say you sold it.

Skillern: Yes, I can fix that up. Likewise, Resources Control the same thing, the same deal.

Erb: Yes. The problem isn't -- I'm sitting there with tons and tons of stock. I've got more stock than

1. Carter's has liver pills right now in these

situations. We're going to make go. I'm going to be using you more and more in my these things because your name is going to start showing up in more and more in prospectus' as being the place where I'm going to lay stock off to.

Skillern: Now here's the thing that I can see in.

Erb: I wrote that letter. It should be in your office by Monday.

Skillern: Good, in my office I'll take it over to them.
That's fine.

Erb: No - No. I sent it right to him direct. I sent you a copy.

Skillern: Good enough - Thanks alot.

Erb: It's already done and

Skillern: Anyway on this thing, anyway you say it will slide down. The 50/50 deal will slide down.

Erb: Oh sure

Skillern: If Xprint comes out beautifully we won't have to worry about a thing really. We won't have to worry about a darn thing if Xprint comes out.

Erb: You still got more.

Skillern: We still have something to worry about. You still got more and more and more.

Skillern: In other words, let's put it this way so I understand it. It will be a 50/50 deal but it'll gradually pare down to 60 or maybe 70/30, and this and tha

Mr. Erb: Oh yeah - and finally, in the end, when you've about used up your tax loss -- we're talking maybe 90/10. Your 90, my 10.

Dr. Skillern: Hi John

Mr. Erb: What?

Dr. Skillern: I was just saying hi John, my office girl's husband just walked in.

Dr. Skillern: I see what you mean. It'll finally pare down to ... what percentage?

Mr. Erb: Hey, are you in your office?

Dr. Skillern: Yes

Mr. Erb: Who the hell came in?

Conversation about office girl's husband

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12/11/69

Tape of Telephone Conversation between Charles Erb
and Scott Skillern

Dr. Skillern: Well, anyway -- does \$xprint come out Monday.

Mr. Erb: Yes.

Dr. Skillern: Well then. Do you think we can get off that Tuesday then?

Mr. Erb: What?

Dr. Skillern: \$xprint -- to claim a profit. You see, if I don't claim profits against my losses I'll just have to pay more tax. You know. .

Mr. Erb: All right, I see what you mean.

Dr. Skillern: In other words, if I sell \$xprint at 14 or 15 and it goes to 20, I'm still the same if I don't sell it before Tuesday. If I sell it after Tuesday, so what if I sell it for 20, it won't make any difference. You know

Mr. Erb: All right, All right, we won't . . .

Dr. Skillern: We'll have to do it . . . and I suppose we'll have to do it when it gets its height there and then we'll have to get off this one. By God I'm smashed! I look at this whole god damn year. I'm going to have a miserable year and going to have a mi-er-able Christmas as it is. It's the worst thing that ever happened to me in my whole life. My only hope is that that paper stock, \$xprint, will kind of hold up next year and be a damned good stock, then eventually we can get off that.

JL:bmj
M-66
Pp. 2

Boy oh Boy, I'm just sick. The whole year has been horrible -- unbelievable . . I've never done this. Now, when you do these underwritings, do you have to supply . . you know, Gregory went broke, did you know that?

Mr. Erb: Yes, sure.

Dr. Skillern: They didn't do it right.

Mr. Erb: True, there's a lot of firms that there's lots happening to right now, but we're continuing to do our business. We need more capital, Scott we could use more capital like tomorrow and I wish Cecil Pond would put some money in my firm. I wish some other people would put money in our firm, but

Dr. Skillern: But, just look at the outside. When I heard those prices, I said, you sell that, let's nail down profits while we can. Boy, that was just instinct there. Of course, Monday morning it will hit its peak, don't you think? You know, this one stock, Bio Derivatives, so I've got to sell these darn things. Do you think you'll get the Letter Investment Stock out Monday or Tuesday?

Dr. Skillern: Exprint?

Mr. Erb: Oh what? Oh, I talked to our lawyers on that end and they may request that, in their best judgment, not to sell that on the offering here because you hold so much.

JL:bmj
M-66
PP. 3

Dr. Skillern: That's too bad, because I'll just hold that much of the bank's money -- hell of a condition there -- time to recoup and we haven't recouped it, that's the bad thing, as I can see. What's the Compu Comp (?) doing?

Mr. Erb: Compu Comp -- I don't know where it closed today.

Dr. Skillern: In round numbers . . .

Mr. Erb: What oh, 6.

Dr. Skillern: Oh Christ, I'm a loser in every god damn thing. I just never had such a year. I'm going to have a miserable Christmas. I feel frankly as though I'm urged out compared to what I was. That's the god damn ball game.

Mr. Erb: Your Molly wasn't too bad.

Dr. Skillern: It's going to come up, I think. It's got a story behind it that most people don't know about, right?

Mr. Erb: Yeah, I would think so. It's 33-7/8 was the high on it today. The volume was only 6,000 shares. But I don't know how the market did today.

Dr. Skillern: Coming around this corner, I don't see nothing but tragedy if I don't get that bank paid off there in decent shape -- and pull some profits. We lost Exprint, O.K., we lost some fast profits there. We can't get anymore Exprint, they're all assigned, aren't they, right?

Mr. Erb: What, what do you want, more Exprint?

Dr. Skillern: Well, I would imagine so, if we could bounce it off the whatcha-callit stock in good shape, the Bio

JL:bmj
M-66
PP. 4

Derivatives, and buy another 1,000 of Exprint and go in there and sell it for 14 or 15.

Mr. Erb: All right, I'll do that for you if you want.

Dr. Skillern: Well, I think, if we could . . .

Mr. Erb: All right, I'll sell one Monday and kick you into more there then. You call me Monday and remind me to do it will you before the opening. Is that what you want to do?

Dr. Skillern: I think we have to . . . that's going to be hot the way this things' coming out. We're in a good market now, let's take advantage of it . . . Get these things going, cause God you know my desperation (?) . . . over here losing \$200,000 bucks on paper stuff and owing the bank \$140,000 . . . Christ. \$144,000 I'm a mangled mess, Chuck. This isn't the way we started out when you gave me the original pitch a year ago, you know.

Mr. Erb: No, it sure isn't

Dr. Skillern: If a man tells me something that doesn't amount to that, there I'd tell him frankly, as a friend, I said, there's something wrong here. This isn't the ball game I was in to play.

Mr. Erb: Yep, I know, Scott . . .

Dr. Skillern: I hope you know it, because I know you're not in desperation because you've got a lot of cash, but you take a guy like me that's been mangled in South Bend, Christ sake I hope you realize every bit of it.

Mr. Erb: I realize every bit of it . . . Now, look, I'm hurting as bad as you, don't you ever think that. I've got . . .

Dr. Skillern: I hate to talk this way, but I hope you realize personal tragedy on one side . . . I know what you have done for me. I appreciate that side of it too, like we've got 20,000 Exprint instead of 10. That's good.

Mr. Erb: Those are big numbers, too, Scott.

Dr. Skillern: If it keeps on going . . . How's Earl Diamond doing with Exprint?

Mr. Erb: Great . . . Company's doing just fine.

Dr. Skillern: Are they selling pretty rapidly?

Mr. Erb: Well, they're off the ground. Who knows how they're going to sell, Scott. All right, Scott, well look, I'll sell the 1,000 Bio for you and I will buy . . .

Dr. Skillern: 2,000 Exprint, if you can.

Mr. Erb: O, K., done it.

Dr. Skillern: If we can do that, we can help a lot cause I need that help, every bit of that god damn help. You know, I'm a pretty desperate creature, I don't mind telling you at this stage of the game just think, even then I paid \$14,000 interest to these banks this year. Just think, \$14,000 interest, Chuck, just on the money that I lost.

Mr. Erb: Would you believe, 25 grand is what I did in interest payments.

JL:bmj
M-66
PP. 6

Dr. Skillern: Yes, but on your income, it's tiny, on mine it's terrific.

Mr. Erb: I wish you'd quit saying it that way. Well O. K. talk to you Monday and I'll do this other thing for you.

Dr. Skillern: Good, I'm very desperate, buy up the 2,000 Exprint and get off the Bio Monday morning, O. K.?

Mr. Erb: Good, talk to you Monday.

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End of conversation - this tape.

EXCERPT FROM GOVERNMENT'S REQUEST TO CHARGE

REQUEST NO. 37

Failure to Call Witnesses by
Either Side - No Inference

If the Government has failed to call a witness who is equally available to both sides, you may not draw an inference that his or her testimony would have been unfavorable to the prosecution. There is no presumption against the Government from its failure to call witnesses if it should appear to you that their testimony would be merely cumulative or repetitive and of no greater value than that of witnesses who have testified. The law does not impose upon a defendant the duty to call as witnesses any persons who are shown to have been present at any of the events involved in the evidence or who may appear to have some knowledge of the matters in question.

Both sides have the right to interview witnesses at any time before or during the trial. Both sides have the right to subpoena or request witnesses to appear in Court.

United States v. Dardi, 330 F.2d 316 (2d Cir.), cert. denied, 379 U.S. 845 (1964), Stenographer's Minutes at trial at pp. 26448-49; United States v. Roth, supra, at 1096.

EXCERPTS FROM THE COURT'S CHARGE TO THE JURY

Now, there is no duty on the part of the government to call in other or additional witnesses whose testimony would merely be cumulative. You are to decide this case on the evidence which is before you or upon the absence of evidence, but not upon evidence which might have been brought before you. Specifically, the government had no duty to call Donald Sedgwick as a witness. As I explained to you earlier, defendants have no duty to call any witnesses or bring any evidence. However, Donald Sedgwick is equally available to both sides, and could be subpoenaed by the government or by any defendant if either of them thought they should do so and, accordingly, no inference follows adverse to anyone from the failure to call him as a witness and no such inference adverse to any side in this litigation follows from a failure to bring in testimony which the jury would regard as merely cumulative.

Now I will mention to you at this point the concept of an aider and abettor. Under the government's theory of this case, it's not alleged that the defendants Erb and DeBoer or either of them personally filed the false registration

materials with the S.E.C. alleged in counts 2, 3 and 4 of the indictment. Or that they personally used the mails to defraud as charged in counts 10 and 12, or that they personally transmitted through the mails a prospectus that failed to satisfy the disclosure requirements of the Securities Act of 1933 as alleged in counts 13, 14, 15 and 16. Rather, the contention is that these defendants, to the extent named in the counts, aided and abetted in the commissions of these crimes.

Now it's not necessary for the government to show that a defendant on trial before you personally filed a registration statement or the amendments to the registration statements or the Lovelett letters or that any defendant personally mailed the letters or prospectuses. Any person who commits the acts which a statute declares to be a crime, of course, commits that crime. But it's also a crime not only to commit the illegal acts to which I will shortly refer but to aid or abet or procure or induce another person to commit such an act. And this is based on a statute, so-called aiding and abetting statute, which reads as follows:

"A. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures

its commission, is punishable as a principal.

"B. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

It is not necessary to a conviction of either defendant on any substantive count in which he is named that you find that he did ever or even any act necessary to complete the offense. Anyone who aided or abetted, or procured, or induced, or caused another person to commit a crime is himself guilty of committing that illegal act.

Now, while there is no precise rule as to what acts constitute aiding and abetting, it is enough if a defendant in some way associates himself with the criminal venture, that he participates in it, as in something he wishes to bring about, or needs, that he seeks by his action to make the criminal efforts of the person who is being aided and abetted succeed.

Now, the third element of these counts is that the false statements or omissions must have been made knowingly and willfully. I direct your attention to the words "knowingly and willfully." What do these words mean? Well, you will hear these words again in connection with some of the later

counts in the indictment which I'm coming to shortly. First, let me say to you what they don't mean. These words do not mean that the government has to show that a particular defendant knew he was breaking a particular law before he can be convicted of a crime. These words don't mean that the government has to show that a defendant intended to profit at the expense of any other person, nor do they have anything to do with his private or personal reasons for violating a statute. For if after considering all the evidence in accordance with my instructions to you you come to the conclusion that a defendant violated the statute, then in that event his personal or private reasons for violating the statute are of no consequence so far as guilt is concerned. But I instruct you that the words "knowingly and willfully," mean deliberately. They mean intentionally. In other words, you must be satisfied beyond a reasonable doubt that the defendant whose case you are considering acted with knowledge, consciously, and in the exercise of his will. The words "knowingly and willfully" are opposed to the idea of an inadvertent or accidental occurrence. An act is done knowingly if it's done voluntarily and purposely, and not because of mistake or accident, mere negligence, or

some innocent reason.

Now, knowledge and intent exist in the mind and since it's not possible to look into a man's mind to see what went on there, the only way you have for arriving at a decision in these questions is to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is not necessary. Knowledge and intent may be inferred from all the surrounding circumstances. As far as intent is concerned, you are instructed that a person is presumed to intend the nature and probable or ordinary consequences of his acts.

Indeed, the intent with which an act is done is often more clearly and conclusively shown by the act itself or by a series of acts than it would be by words or by explanations after the event. Frequently, the acts of individuals speak their intentions more clearly than do their words. There is a famous old saying, actions speak louder than words. And accordingly, intent, willfulness and knowledge may be established by surrounding circumstances as of the time the acts occurred

or the events took place, and by reasonable inferences to be drawn therefrom by the jury.

EXCERPTS FROM DEFENSE EXCEPTIONS TO THE COURT'S CHARGE

Do you have anything, Mr. Naftalis?

MR. NAFTALIS: I do.

THE COURT: I don't like to keep them sitting there too long if I can avoid it.

MR. NAFTALIS: I will go as quickly as I can. Your Honor, when you charged aiding and abetting, one thing which I felt should have been charged and one thing your Honor said throughout the case was not in there and I think it could be misleading unless it is told to them, that mere knowledge on the part of the defendant that an offense is being committed is not sufficient to make him culpable or words to that effect, that was not included, and I would respectfully ask that it be included. It's very applicable in this case.

THE COURT: You see that discussion was at all times relating to the conspiracy count. All of our argument on that score. I defined what constitutes aiding and abetting. I

think I have been very clear on knowingly and willfully. And I decline to single out that particular aspect of it and tell them what something is not at this stage. I was talking about what you are describing in my arguments, mostly the ones I had with Mr. Lowe here, about whether count 1 had to be dismissed.

MR. NAFTALIS: That is accurate.

THE COURT: I don't remember discussing it about the concept of aiding and abetting. I think I've properly defined aiding and abetting and I decline to modify the instruction as to that and you may have an exception.

MR. NAFTALIS: Secondly, your Honor, regarding your instruction on Mr. Sedgwick in which you instructed the jury that they could not draw any inference in the government's failure to call him because he was merely cumulative, I would except to that and ask your Honor to reinstruct for the following reasons:

Number one, Mr. Sedgwick is not a witness who is merely cumulative. He had made a disclosure under Brady against Maryland by Mr. Lowe. I interviewed Mr. Sedgwick on the telephone one of my associates, and had Mr. Sedgwick been called as a witness, at least insofar as he has told us, he

would have flatly contradicted Mr. Van Aken and said he was not a nominee but he considered himself to be the owner of the securities.

Under those circumstances, your Honor, I would think that an instruction that he's merely cumulative and they should not consider it wouldn't --

THE COURT: He's cumulative in that he was there at the same time and place and participated in the same conversations that other witnesses testified to. His version can be different and he can still be cumulative.

MR. NAFTALIS: Except it seems to me my understanding of the law on uncalled witnesses by the government is that it is the jury's function to make a judgment whether or not he is cumulative or not.

THE COURT: I told them that, that you find -- cumulative is the word I used. I decline to modify my instruction as to cumulative witnesses and I think that exception I'm granting you on that point out to also pertain to Mr. Koenig. So you, Mr. Koenig, have an exception as to my charge on cumulation.

AFFIDAVIT OF SCOTT D. SKILLERN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

CHARLES D. ERB and
FRANKLIN S. DEBOER

)
)
)
)
)
)

74 Cr. 818

I, Scott D. Skillern, having heretofore testified as a witness for the prosecution at the trial of the above-entitled criminal cause of action on April 24, 1975, make the following statement regarding the affairs of defendant Charles D. Erb and myself:

I was never a "dummy" account on any transaction for Mr. Erb either for tax reasons or for earnings. I never shared any profits or commissions with Mr. Erb. This I repeatedly told the United States Attorney prosecuting the above cause at pre-trial interviews and he was cognizant of this fact. As to my testimony regarding federal income taxes, I initiated the telephone call to Mr. Erb inquiring as to the possibility of establishing profits in my account with the firm of Baerwald and DeBoer so as to take advantage of my existing tax-loss position. I did not know in any way that this was against the law

and to this day do not understand it. In any event no actions were ever taken to implement any such plan and no tax advantage to myself every thereby accrued. These facts were also brought out by me to the United States Attorney on several occasions.

Regarding the 50,000 shares of X-Print stock, the "gentlemen's agreement" entered into between Mr. Erb and myself in May or June, 1969 at some later, indefinite time became meaningless to me because of the staggering losses suffered by me as a result of my association with Baerwald and DeBoer and the subsequent failure of X-Print Corporation. However, in October, 1969 a three party telephone conversation, only recalled to my recollection in the last two days, was initiated at the request of Mr. Richard Rosenthal, then president of the St. Joseph Bank and Trust Company of South Bend, among Mr. Erb, Mr. Rosenthal, and myself regarding the security, including the X-Print, for my large, outstanding loan from the bank; and although I can not now recall said conversation verbatim, I can now understand how Mr. Erb, considering the manner and nature of the demands and requests made of him by Mr. Rosenthal and me in said conversation relative to the X-Print stock, including the demand for the provision by Mr. Erb to the bank of the

letter establishing the ownership and value of the X-Print shares in question (Exhibit HH), could reasonably have inferred that I considered the "gentlemen's agreement" as then being no longer in force and effect. My additional, subsequent actions in (a.) pledging, or offering to pledge, the X-Print stock to the St. Joseph Bank and (b.) subsequent subordination in October, 1969 by me of my trading account to Baerwald and De Boer reasonably could have furthered such misunderstanding by Mr. Erb as to the state of mind regarding the "gentlemen's agreement" and necessarily the ownership of the subject 50,000 shares of the stock of the X-Print Corporation. It was, in fact, sometime during the month of December, 1969, as a result of Mr. Erb's failure personally to lend me \$25,000.00, as earlier agreed, that I considered the "gentlemen's agreement" terminated and the subject of the public disclosure at my discretion.

At no time had I any intent to defraud the St. Joseph Bank; to the contrary, it was my understanding and intent that the 20,000 shares of subject X-Print stock were to be registered and sold at approximately \$7.50 per share (cf. November, 1969 tape) with the proceeds to be used for payment of the balance

of my loan from the St. Joseph Bank.

/s/ Scott D. Skillern
Scott D. Skillern .

STATE OF INDIANA)
) SS.:
ST. JOSEPH COUNTY)

Scott D. Skillern, having been first duly sworn upon his oath, personally appeared before me on the 20th day of September, 1975 and did swear to the truth of the statements contained in his above Affidavit and in witness thereof did on the 20th day of September, 1975 above endorse his signature thereto.

/s/ Henry A. Hoover
Henry A. Hoover, Notary Public

My Commission expires May 16, 1979

AFFIDAVIT OF SCOTT D. SKILLERN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA)

vs.)

74 Cr. 818

CHARLES D. ERB and FRANKLIN)
S. DEBOER)

I, Scott D. Skillern, having heretofore testified as a witness for the prosecution at the trial of the above case, make the following statement:

1. The tape recordings of my telephone conversations with Charles D. Erb which were offered in evidence by the Government at the trial were volunteered by me to the Government, through my attorney, before the trial.

2. Prior to my testimony at the trial, during the time that I was being prepared by Mr. Lowe to testify, Mr. Lowe in the presence of his associate, Mr. Jupiter, made the statement to me that the portion of my taped discussion with Mr. Erb about the possibility that in the future stocks would be placed in my name, that they would later be sold, that I could then offset the profits with my own tax losses, and that I could retain all or a portion of the profits were illegal

from a tax standpoint. (Mr. Lowe may have stated explicitly that these discussions involved "tax evasion", but I do not remember his exact words.) I told Mr. Lowe that it had never occurred to me that transactions of this kind would be illegal from a tax or any other standpoint, and stated explicitly and categorically to him that I had in no way contemplated evading taxes in considering these transactions. I further told Mr. Lowe that I, and Not Mr. Erb, had thought of the possibility of entering into such transactions and that it was I and not he who had proposed them in our conversations. I further told Mr. Lowe that none of the proposed stock transactions referred to above were ever entered into.

3. In the course of my preparation to testify, neither Mr. Lowe nor any of his associates went through the tapes or transcripts with me to question me about all of the details of the conversations and, specifically, not one of them ever asked me to comment or explain any of the specific statements made by me or Mr. Erb on the tapes relating to the proposed stock transactions which are referred to above.

/s/ Scott D. Skillern
SCOTT D. SKILLERN

STATE OF INDIANA)
ST. JOSEPH COUNTY) SS.:

Before me this 12th day of November, 1975 appeared Scott D. Skillern, and after first having been sworn upon his oath, says that the facts in the foregoing instrument are true and acknowledged his signature thereto.

/s/ Kathlenn M. Van Der Heyden
Kathleen M. Van Der Heyden
Notary Public

My Commission Expires: May 27, 1979

(Seal)

AFFIDAVIT OF CHARLES D. ERB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

CHARLES D. ERB and FRANKLIN S. DE
BOER,

Defendants.

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

CHARLES D. ERB, being duly sworn, deposes and says:

1. At the trial of the above case George Van Aken testified to several conversations with me in the Spring of 1969, including one with Mr. DeBoer, in which it was discussed that rules prohibiting excess compensation to underwriters would prohibit my ownership of X Print stock because Baerwald & DeBoer was to be the underwriter in X Print's public offering, and in which it was discussed that Mr. DeBoer, Van Aken and I should place our stock in nominee names so as to circumvent these rules. I categorically deny that I ever had any such conversations with George Van Aken or Mr. DeBoer.

2. There was also testimony at the trial that a meeting was held in the Spring of 1969 at which Paul DeCoster

explained these excess compensation rules to Van Aken, Conrad Schmitt and Earl Deimund, and there was some testimony that I was present at that meeting. DeCoster and Deimund testified to such a meeting in Conrad Schmitt's office at Kimberly Capital Corporation, at U.N. Plaza, and Paul DeCoster testified that the date of that meeting was May 12, 1969.

3. I categorically deny that I was ever present at any such meeting. Indeed I have never been in Conrad Schmitt's office at Kimberly Capital Corporation at U.N. Plaza. (or in any other office of the Corporation there). During the trial my 1969 diary was in my accountant's possession, and I received my diary back from him for the first time after the trial. My diary shows no appointments for Friday, May 9, and one canceled appointment for Monday May 12, which was rescheduled for May 13, all of which strongly indicates that I had no New York appointments from May 9 through May 12 and was not even in New York. To the best of my memory, from a recent review of that diary and discussion with friends, I believe that I was staying as a houseguest at the home of Larry Gibbons in Whittier, California, over the weekend before the 12th of May, and believe that I came back to New York on May 12th, returning after

business hours.

CHARLES D. ERB

Sworn to before me this
day of , 1975.

AFFIDAVIT OF EARL DEIMUND

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

CHARLES ERB,

Defendant,

-----X
STATE OF FLORIDA)
COUNTY OF) ss.:

EARL DEIMUND, being duly sworn, deposes and says:

1. In connection with preparing to be a witness at the above trial I was interviewed by representatives of the United States Attorney, including first Mr. Wohl and later Mr. Lowe. I was specifically asked whether Charles Erb had been present at a meeting at the U. N. Plaza offices of Conrad Schmitt which I believe was in May, 1969, at which Paul De Coster explained that excess compensation rules would prevent ownership by Messrs. Van Aken and Erb of X Print stock if Baerwald & DeBoer were to be the underwriters in connection with the X Print public offering. I told the persons who interviewed me, first Mr. Wohl, and later Mr. Lowe when I was preparing for my trial testimony, that it was logical that Mr.

Erb might have been there, but that, although I was sure that Van Aken, De Coster and Schmitt were present, I believed it was only a 30% probability that Mr. Erb was there. I told them further that I had some vague memory that someone may have arrived at the meeting about two hours late, and that it was possible that this was Mr. Erb. Indeed, on the day I testified at the trial Mr. Lowe again asked me whether I did not clearly recall that Mr. Erb was at the meeting and I again told him what I had previously said. Then once more in the Courthouse, just before I testified, Mr. Lowe asked the same question and I gave the same answer.

2. My present recollection on this subject is unchanged. I have seen the two references to this point at pages 412 and 438 of the transcript and did not mean by those answers to express a firm recollection that Mr. Erb was present.

3. Since 1970 I have seen Mr. Erb only twice: once at the trial and once on September 30th, 1975, when he contacted me about facts which are the subject of this affidavit.

/s/ EARL E. DEIMUND, II
EARL DEIMUND

Sworn to before me this
14th day of November, 1975.

/s/ Dorothy M. Forrester
Notary Public, STATE OF FLORIDA at LARGE
MY COMMISSION EXPIRES MAY 13, 1977
Bonded by American Bankers Insurance Co.

AFFIDAVIT OF CONRAD SCHMITT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

CHARLES D. ERB and FRANKLIN S.
DEBOER,

Defendants.

-----X

STATE OF MINNESOTA)
COUNTY OF MINNESOTA) ss.:

CONRAD SCHMITT, being duly sworn, deposes and says:

1. In 1969 I was employed as President of Kimberly Capital & Development Corporation. My offices were located at 866 United Nations' Plaza in New York City.

2. In the Spring of 1969, I attended various meetings with persons including Earl Deimund, George VanAken and Paul De Coster on the subject of X Print Corporation.

3. To the best of my recollection there was never an occasion in May of 1969 or at any other time when Charles Erb and I were together, either alone or with others, in the offices of Kimberly Capital Corporation. In addition it is my best recollection that I never had any meetings about X Print with Mr. Erb or in his presence, either alone or with

others.

4. I was interviewed by representatives of the U.S. Attorney's office concerning the X Print case prior to the trial at the United States Courthouse in New York. To the best of my recollection I told the representatives of the U.S. Attorney that my dealings in connection with X Print were with Mr. Van Aken and not Mr. Erb and that I never had any discussions with or in the presence of Mr. Erb about X Print. I do not now recall whether I was specifically asked whether Mr. Erb had ever been present in my office at a time when Paul DeCoster gave any advice about rules relating to underwriters' excess compensation. If I was asked this, I am sure I answered that to the best of my recollection Mr. Erb was not present at any such conversation.

CONRAD SCHMITT

Sworn to before me this
day of November, 1975.

AFFIDAVIT OF AUSA JOHN A. LOWE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

No. 74 Cr. 818 (CLB)

CHARLES D. ERB,

Defendant.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

JOHN A. LOWE, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Thomas J. Cahill, United States Attorney for the Southern District of New York. I tried the above-captioned case on behalf of the Government. I make this affidavit in opposition to the defendant Erb's motion for a new trial.

2. I never met, spoke or otherwise communicated with Mr. Conrad Schmitt. I was told by Lester Green, Esq., attorney for the Securities and Exchange Commission who participated in the entire course of the investigation of this case and who assisted me at trial, that Mr. Schmitt had told Mr. Green and Mr. Wohl, the Assistant United States Attorney who

conducted the grand jury investigation, that he had no recollection of any events of significance to the subject matter of this case. I concluded, therefore that there was no reason to communicate further with him.

3. I interviewed Mr. Earl Deimund several times prior to his appearance as a witness at the trial. I reviewed with him his recollection of the events to which he testified at trial, including the May meeting which is the subject of his affidavit. At no time did Mr. Deimund tell me that he "believed it was only a 30% probability that Mr. Erb was there." (Deimund Affidavit, p.2). Mr. Deimund never used the phrase "30% probability" to me in any connection. Mr. Deimund consistently placed Mr. Erb at the May meeting to the best of his recollection. Mr. Deimund never told me that he recalled that someone came to the May meeting late and that that person might have been the defendant Erb.

4. His statements concerning the certainty and accuracy of his recollection were always the same as he testified to on cross-examination at the trial (Tr. pp.432-433):

"Q Now, Mr. Deimund, are you having any great difficulty in recalling what occurred in 1969 as far as specific conversations and the identity of individuals are concerned?

A I'm having reasonable difficulty, I believe

it would be fair to say.

Q And some of the statements which you attributed to various people are based upon your best recollection of what occurred at the time, is that correct?

A That is correct.

Q And also the identity of who may have been present at a conference?

A That is correct.

Q You have no written memoranda of any sort which has been used to refresh your recollection, is that right?

A There are in the files subpoenaed several memoranda which I have reviewed that were written at the time; yes.

Q And that together with your independent recollection has been the source of your testimony today, is that right?

A That is correct."

5. Apart from the testimony quoted above, Mr. Deimund was not cross-examined at trial regarding Mr. Erb's presence at the May meeting. Conrad Schmitt was never called as a witness at the trial. The defendant Erb himself exercised his right not to testify at the trial.

Sworn to before me
this day of
November, 1975.

JOHN A. LOWE
Assistant United States Attorney

NOTARY PUBLIC

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-v-

74 Crim 818-CLB

CHARLES D. ERB and FRANKLIN DE
BOER,

Defendants.

-----X

Brieant, J.

Defendant Erb moved, pursuant to Rule 33, F.R.Crim.P., for an order granting a new trial upon the grounds that: (1) the Court admitted into evidence erroneously certain prejudicial tape recordings; (2) the prosecutor in his summation to the jury made an improper comment regarding this evidence; (3) the Government breached its obligations of disclosure under Brady v. Maryland, 373 U.S. 83 (1963); and (4) there is newly discovered evidence. Defendant DeJoer also moved for a new trial upon the information brought forward by Erb, although he raises separate grounds for his motion.

Erb was convicted on four counts of violating 15 U.S.C. §77x involving the filing of false registration statements of the common stock of Xprint Corporation; two counts of mail

fraud; and four counts of using the mails to transmit a prospectus as to which no proper registration statement had been filed, in violation of 15 U.S.C. §§77e(b) and 77j. De Boer was convicted on one count of having violated 15 U.S.C. §77x.

I

Erb, DeBoer and George VanAken, an admitted co-participant in the crimes here alleged, were partners in the now defunct securities firm of Baerwald & DeBoer. The multiple count indictment alleged that Erb and DeBoer, prior to the public offering of Xprint common stock for which the Baerwald & DeBoer firm was acting as underwriter, purchased shares in Xprint at a price below the offering price, concealed their ownership of these shares by the use of nominees, and offered a portion of their holdings in the public offering without disclosing their true ownership. In effecting these transactions, Erb use as his nominee Dr.Scott Skillern and DeBoer used James Lovelett. A more detailed discussion of the evidence adduced at trial appears in the Court's Memorandum and Order dated September 5, 1975, familiarity with which is assumed.

VanAken, stock swindler turned Government informer, described his own involvement along with that of Erb and De Boer, and testified concerning the chronological development of their Xprint dealings. VanAken testified that on April 22, 1969, he and Erb met with L Boer to ask him to invest in Xprint, telling him that a public offering was planned, and that he could include in the planned underwriting 2,500 of the 5,000 shares which he was offered. DeBoer agreed, but said that he would take the shares in Lovelett's name because of tax considerations and because of the possibility that his later resale would be computed with the underwriter's fee and push their compensation above the level deemed appropriate by the National Association of Securities Dealers, Inc. ("NASD"). Van Aken also testified that he and Erb met with Earl Deimund, President of Xprint, and Paul DeCoster, counsel for Xprint, in May 1969 in the offices of Conrad Schmitt. VanAken testified that DeCoster told them that if they took the shares in their own names they would violate the NASD rules barring excessive compensation to underwriters, VanAken said that he would take his shares in the name of Donald Sedgwick and Erb said that he would use Skillern.

Dr. Scott Skillern is a successful dermatologist

practicing in South Bend, Indiana. Skillern, appearing as a Government witness, testified that through Erb, he purchased 20,000 shares of Xprint. In the registration statement, prospectus, and various mailed communication, it was represented that Skillern owned 50,000 shares. It was the Government's theory that the remaining 30,000 shares were in fact owned by Erb though held in Skillern's name.

The Government introduced three tapes of telephone conversations between Erb and Skillern that Skillern had recorded. Erb's trial counsel objected to the receipt of these tapes on the ground that the conversations contained references to transactions in other securities that were irrelevant and prejudicial. The Court overruled the objection but limited the receipt of the tape recordings to those portions relating "to Xprint and to [Skillern's] motivation or. . . situation with respect to his Federal income tax," while still satisfying the evidentiary rule of completeness. (Trial Tr. p. 395).

In the taped conversations, Skillern refers to his ownership of 20,000 shares of Xprint and Erb did not correct Skillern's statement to say that he was the owner of 50,000 shares. On October 28, 1969, Erb and Skillern discussed the

Xprint offering:

"Dr. Skillern: Because this is the thing I've been wanting to do is stimulate you to get this damn debt off and everything else and the Xprint will go out and any new deal that you got that's good. . .

Mr. Erb: You know how much you're registered for in Xprint, don't you?

Dr. Skillern: Twenty.

Mr. Erb: Well, it's in the prospectus Dr. Skillern. Yeah. Did you read it?

Dr. Skillern: No. I didn't read my name.

Mr. Erb: Well your name is already in there and you're registering stock.

Dr. Skillern: I'm the damndest guy. I never read my name through the whole thing. I saw Bert Knight bought some at 2 dollars a share. You know I read. . .

Mr. Erb: You didn't buy any at two bucks. You didn't buy any at two bucks.

Dr. Skillern: No, I didn't any at two bucks. I didn't know I was registered. I'll read that Xprint thoroughly again. I missed my name.

Mr. Erb: You're registering stock.

Dr. Skillern: I'll be damned. I didn't see it in the registry. That's good. That's good just shore me up because here's the thing, if we can get me up to about 150 grand. Do you think you can do it in two months. See the days are closing near. Two whole months."

Not all of these taped conversations provided such direct proof.

In the tapes, references are made to transactions in other securities as to which there was no claim of violation of the securities laws. Also, in these conversations, Erb and Skillern discussed Skillern's income tax predicament and losses that he had incurred in other stock transactions.

In summation, the Assistant United States Attorney characterized Skillern as "an unsophisticated guy. . .[with] larceny in his heart", who "[i]f he could have turned a crooked buck. . .would have." (Trial Tr. p. 902). The prosecutor then said that he did not feel confident in his ability to explain the contents of the tapes except in the most general terms. After quoting from the October 28, 1969 conversation, the prosecutor argued:

"Do you know what they were doing, ladies and gentlemen? They were trying to cheat on taxes, because you remember Dr. Skillern had all these losses, you know, he's always trying to shore up his mounting losses. These losses can be valuable at tax time." (Trial Tr. p.902).

It was, and remains, the Government's theory that Erb and Skillern were planning tax evasion by having transactions for Erb's benefit done in Skillern's name, as it was contended was done in the Xprint transaction, so as to take advantage of Skillern's loss carry-over deductions. Defense

counsel objected to the prosecutor's argument. The Court sustained the objection, and specifically instructed the jury (Trial Tr. p. 907):

"Ladies and gentlemen of the jury, nobody is on trial here for trying to cheat on their taxes. Confine your consideration of this case to the specific open charges in the indictment, and disregard the argument made."

In a fraud case, the Government is not required to prove an evil motive. United States v. Simon, 425 F.2d 796 (2d Cir. 1969), cert. denied 397 U.S. 1006 (1970). However, "the Government may prove motive as circumstantial evidence that an offense was in fact committed, even where such proof might incidentally show the commission of another offense." United States v. Murphy, 374 F.2d 651, 654 (2d Cir.), cert. denied 379 U.S. 828 (1964); Rule 404(b), F.R.Evid.

The Court adheres to its rulings that the tapes were properly received. The probative value of the tapes clearly outweighed any prejudice to the defendant. The tapes provided direct proof of the difference between Skillern's true ownership of Xprint stock, and the larger number of shares attributed to him in the registration statement. Erb's failure to correct Skillern's statements regarding Skillern's

ownership of the 20,000 shares, under the circumstances of this case, stands as a recorded admission by the defendant that the 50,000 share figure was incorrect. The tapes also provided circumstantial evidence of motive, and the absence of innocent mistake, which was probative of criminal intent. Evidence that Erb may have been involved in a scheme to evade taxes, while damaging, was not so inflammatory (sic) or of such character that the likelihood of prejudice outweighed its probative value. United States v. Williams, 470 F.2d 915 (2d Cir. 1972); United States v. Kaufman, 453 F.2d 306 (2d Cir. 1971).

Although the prosecutor unduly emphasized the tax evasion motive in his argument, there was a foundation for this inference in the evidence. Cf. United States v. Fiorella, 468 F.2d 688 (2d Cir. 1972), cert. denied 417 U.S. 917 (1974). Any prejudice to the defendant Erb was limited by the curative instruction immediately given. Erb's defense counsel, in his summation, seized upon the prosecutor's concession that Dr. Skillern was not the model of honesty to argue that Skillern's testimony was unworthy of belief, inviting the jury to compare the high moral character of Erb with the low moral character of his accusers, VanAken and Skillern. (Trial Tr. 996). In

its charge at the close of the case, the Court instructed the jury:

"Anything the lawyers, either for the government or any defendant may have said with respect to matters in evidence, whether during the trial or in a question or in an argument or in summations, is not to be substituted for your own recollection of the evidence."
(Trial Tr. p. 1026)

Reading the summation as a whole, in the light of the Court's instructions, we find no prejudice to the defendant that would warrant the granting of a new trial. United States v. Briggs, 457 F.2d 908 (2d Cir.) cert. denied 409 U.S. 986 (1972).

After the trial, Skillern swore to three affidavits. In an affidavit sworn to on September 20, 1975, Skillern denied that he and Erb were involved in a tax evasion scheme and swore that he did not act as "dummy" for Erb for tax purposes. Skillern stated that he had so advised an Assistant United States Attorney in interviews conducted prior to the trial. Skillern further stated that he informed the prosecutor that he had discussed the possibility of establishing profits in his account to utilize his tax-loss position but that no plan was ever implemented and he obtained no tax advantage. In an

affidavit sworn to October 13, 1975, obtained by the Government, Skillern stated that he did not wish to recant any of his trial testimony and that he reaffirmed his statement that of the 50,000 shares in his name, he owned 20,000 and Erb owned 30,000. In an affidavit sworn to on November 12, 1975, Skillern stated that he had told the prosecutor that he had not contemplated tax evasion and that none of the stock transactions discussed had been consummated.

Erb contends that these prior statements by Skillern denying the prosecutor's interpretation of these tapes in his summation constituted Brady material and that the failure to disclose Skillern's denial requires that Erb be granted a new trial. To qualify as Brady material, the evidence must be material and of a favorable character to the defendant.* Moore v. Illinois, 408 U.S. 786, 794-95 (1972). There is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all. . .investigatory work on a case." 408 U.S. at 795.

The Court instructed the jury to disregard the prosecutor's argument that Erb and Skillern were involved in a scheme to evade taxes. The Court instructed the jury that a

plan to evade taxes, if there were one, was immaterial. "If the evidence is offered to prove a proposition which is not a matter in issue or probative of a matter in issue, the evidence is properly said to be immaterial." McCormick on Evidence §185, at 434 (2d ed.). Proof or argument that Erb and Skillern planned to evade taxes was not material except as it may have borne upon motive or intent. Likewise, it was immaterial that Skillern had denied the existence of such a plan. Proof that Skillern lacked the criminal intent to commit tax fraud did not prove that Erb lacked the criminal intent to commit securities and mail fraud.

Materiality also has a special meaning in the context of Brady; it "describes evidence of greater value than that which is merely 'favorable to the accused'." United States v. Pfingst, 490 F.2d 262, 277 (2d Cir. 1973), cert. denied 417 U.S. 919 (1974). Evidence that Dr. Skillern did not intend to evade federal income taxes certainly does not satisfy this standard.

The prior statement of Skillern does not qualify as Brady material for its value as a tool in impeachment. Cf. United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975). Here, Skillern, in his prior statement, denied having committed a criminal act

and Erb does not contend otherwise. At trial, it was the prosecutor and not the witness Skillern who referred to the tax evasion scheme; consequently, this was not a prior inconsistent statement by the witness which should have been available for impeachment.

II

VanAken testified that he and Erb attended a meeting on May 12, 1969 with Deimund and DeCoster in the office of Conrad Schmitt at Kimberly Capital Corporation. VanAken testified that at the time DeCoster told them that if they took the Xprint shares in their own names they would risk violating the NASD rules governing excessive underwriter's compensation.

DeCoster also testified concerning this meeting. DeCoster testified that it was his best recollection that Erb attended the meeting but then qualified this statement saying that he was less certain that Erb was present than he was that other persons were present. (Trial Tr. p. 546). DeCoster substantially corroborated VanAken's account of the meeting's agenda. DeCoster testified that VanAken told him that he understood the rule limiting underwriter's compensation and

asked that he and Erb be permitted to designate owners for the stock that was to have been sold to them. It was agreed that Erb and VanAken could designate substitute owners. The Court specifically instructed the jury that testimony regarding the May 12th meeting was not binding on Erb unless the jury found that Erb had been present. DeCoster also testified that in the middle of June, 1969, Erb informed him by telephone that his designee would be Skillern. (Trial Tr. p. 550).

Deimund testified that DeCoster apprised him of the problems that might be encountered if Baerwald & DeBoer acted as underwriters for the Xprint offering, and VanAken and Erb owned shares in that corporation. Deimund testified that he and DeCoster told VanAken, Erb and Schmitt that they could not own shares themselves.

After trial, in an affidavit sworn to on November 14, 1975, Deimund stated that in pre-trial interviews with two Assistant United States Attorneys, he told them:

"that it was logical that Mr. Erb might have been there, but that, although I was sure that VanAken, DeCoster and Schmitt were present, I believed it was only a 30% probability that Mr. Erb was there. I told them further that I had some vague memory that someone may have arrived at the meeting about two hours late, and that

it was possible that this was Mr. Erb."

Deimund claims to have so informed the prosecutor on several occasions.

Conrad Schmitt, who did not appear as a witness at trial, swore to an affidavit afterwards that he attended various meetings concerning Xprint in the Spring of 1969 with VanAken, Deimund and DeCoster. Schmitt further stated that he never had any meetings about Xprint with Erb, and specifically that Erb was not present during the meeting at Kimberly Capital Corporation. Moreover, Schmitt claims that, in an interview prior to trial, he so informed representatives of the United States Attorney's Office.

The Government denies that Deimund or Schmitt made their respective statements in pre-trial interviews and has submitted the affidavits of the Assistant United States Attorneys involved, as well as the affidavits of two staff members of the Securities and Exchange Commission who assisted in the investigation. For purposes of this motion, however, the Court assumes that these statements were made.

The factual issue at trial was whether Erb was present at the meeting of May 12, 1969. VanAken testified that Erb was there and DeCoster believed that Erb was present. Erb's trial

counsel ably demonstrated that Deimund was not certain in his recollection that Erb had been present. On cross-examination, defense counsel elicited a concession from Deimund that he was having "reasonable difficulty" in recalling specific conversations and the identities of participants in conversations that had occurred in 1969. (Trial Tr. pp. 432-33).

Erb ought to have known whether he had been present at a meeting where he is alleged to have been informed that he may be in violation of the NASD rules. The Government witnesses had placed Schmitt at the meeting in Schmitt's office. Erb elected to exercise his privileges not to testify and not to call Schmitt or any other witnesses in his behalf.

"The purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him." United States v. Ruggiero, 472 F.2d 599, 604 (2d Cir.), cert. denied 412 U.S. 939 (1973). (Emphasis added).

Here, defendant was on notice of the essential fact which would have enabled him to call Schmitt as a witness, or to testify himself. United States v. Ruggiero, supra; United States v. Stewart, 513 F.2d 957 (2d Cir. 1975).

Assuming, solely for the completeness of the argument, that these statements should have been disclosed, a new trial is not warranted. Under the circumstances here presented, the failure to disclose must be viewed as inadvertent, and, therefore

"a new trial is required only if there is 'a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction'." United States v. Rosner, 516 F.2d 269, 272 (2d Cir. 1975).

DeCoster, a thoroughly credible witness, testified that his best recollection was that Erb was present at that meeting when compliance with the NASD rule was discussed. Van Aken testified similarly and, although VanAken suffered problems of credibility, the jury could reasonably believe his corroborated testimony. VanAken also testified that he and Erb had previously met with DeBoer in the Spring of 1969 and DeBoer had informed them of potential difficulties with the NASD. (Trial Tr. p. 75). In addition, it was DeCoster's testimony that Erb designated Skillern as his nominee, not at the meeting of May 12, but in a telephone conversation in mid-June. Upon the entire trial record, it does not appear that either

of these statements could have been developed so as to have avoided a conviction.

Moreover, the criminal acts here charged to not involve the violation of a rule of the NASD. The acts here charged stem from the knowing and wilfull making of false statements in registration statements and prospectuses filed with the SEC, and the use of the mails to accomplish a fraud. If knowingly and wilfully done, it is irrelevant whether the false statements were made to avert detection by the NASD or for any other purpose, or no purpose. Proof as to the May 12th meeting bore upon the defendant's motive and his knowledge of the law. Ignorance of the law would have been no excuse for its violation. United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971). If Erb had never been informed of the existence of the NASD rules, which we doubt, since he was a partner in a firm of underwriters, he would still be guilty of these charges if he knowingly and wilfully made these false statements.

Defendant also contends that he has now obtained newly discovered evidence that demonstrates that he was not in attendance at the May 12th meeting. The evidence which it is alleged is newly discovered is Erb's diary for 1969 which Erb

claims was in the possession of his accountant during trial. The diary shows an appointment unrelated to Xprint crossed out on May 12th. The diary shows no appointments for May 9th. Erb now contends, premised on the absence of any entries in this diary, that he was in California from May 9th through May 12th. In support of this contention, he has submitted the affidavits of two persons then living in the vicinity of Whittier, California, who attest that they spent time there with the defendant during the weekend of May 10-11, 1969.

"To succeed on [a motion for a new trial based on newly discovered evidence] a defendant must show, inter alia, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict." United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975).

In the exercise of reasonable diligence, defendant could be expected to obtain his diary for the time period referred to in this indictment. It is difficult to imagine the circumstances under which the accountant's need for this diary could have exceeded Erb's own need to prepare his defense. There is no suggestion made that these witnesses were not known prior to trial. In the event that they could not testify at

the trial here, their depositions might have been taken in accordance with Rule 15, F.R.Crim.P. The existence of these alibi witnesses, and the diary could have been discovered prior to trial. United States v. Slutsky, supra; United States v. Fistel, 460 F.2d 157 (2d Cir. 1972).

Assuming that defendant's neglect were to be excused, there is no basis for inferring that had these witnesses testified, a different verdict would have resulted. As discussed earlier, the May 12th meeting while probative of criminal intent was not the crux of the offense. A reasonable juror could conclude that Erb did not attend that meeting and still return a guilty verdict on these charges.

III

Defendant DeBoer also moves for a new trial upon these affidavits. DeBoer contends that the Government's failure to disclose the prior statements of Schmitt and Deimund deprived DeBoer of information helpful to his defense. It is not contended that this evidence would have rebutted any testimony directly relevant to the case against DeBoer since no witness, not even VanAken, placed DeBoer at the May 12th meeting. In

fact, the Court gave the jury a cautionary instruction that this testimony was taken subject to a connection that was never established as to the defendant DeBoer. (Trial Tr. p. 546). Rather, it is contended that this testimony would have undermined VanAken's credibility generally to the extent that the jury would also have rejected VanAken's other testimony that was inculpatory of DeBoer.

As in United States v. Rosner, supra, at 273-74, the issue

"is whether additional evidence tending further to impeach the credibility of a witness whose character has already been shown to be questionable, . . . might have induced a reasonable juror who had no reasonable doubt of [defendant's] guilt, to have such doubt." (Emphasis in original).

When VanAken testified, DeBoer "was not confronted by a witness of assumed moral rectitude whose collapse from virtue might destroy the foundation of the prosecution case." Rosner, supra, at 275. VanAken's life of fraudulent dealings was exposed to the jury, as well as the Government's promise of assistance in sentencing and grant of immunity from prosecution for his participation in the Xprint fraud. The testimony of a witness contradicting VanAken as to a fact that did

not involve DeBoer would not have succeeded to undermine Van Aken's credibility where a direct onslaught had failed, and would not have produced a different result.

DeBoer also moves for a new trial because his co-defendant who exercised his privilege not to testify at trial now states in an affidavit that he never had a conversation with DeBoer and VanAken regarding using nominees to circumvent the NASD rules. This statement refutes VanAken's testimony that such a meeting took place on April 22, 1969.

"[A] court must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavailable only because a co-defendant, since convicted, has availed himself of his privilege not to testify." United States v. Jacobs, 475 F.2d 270, 286, r 33 (2d Cir.), cert. denied sub. nom. Thaler v. United States, 414 U.S. 821 (1973).

In every multiple defendant trial, a convicted defendant might complain that by reason of the joint trial he was deprived of the exculpatory testimony of a co-defendant. Were the rule such as to permit a new trial under these circumstances, the Government might never try two defendants indicted for the same criminal transaction together, because to try them together would deprive each of the testimony of the other and to try them seriatim would prejudice the defendant tried first.

In view of the additional evidence inculcating De Boer, notably the testimony of James Lovelett and Government's Ex. 104 [a note from DeBoer: "VanAken, where is my stock that I paid \$10,000 for?"]], the Court finds that the interests of justice would not be served by awarding DeBoer a new trial.

CONCLUSION

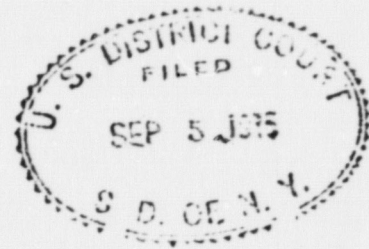
The motions are in all respects denied.

So Ordered.

Dated: New York, New York
February 10, 1976

/s/ CHARLES L. BRIEANT
CHARLES L. BRIEANT
U.S.D.J.

MEMORANDUM AND ORDER ON MOTION
FOR JUDGMENT OF ACQUITTAL



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

74 Cr. 818-CLB

-v-

MEMORANDUM AND ORDER

CHARLES D. ERB and FRANKLIN S.
DeBOER,

Defendants.

-----X

#43037

Bricant, J.

Defendants Charles D. Erb and Franklin S. DeBoer move for judgments of acquittal, pursuant to Rule 29(c), F.R.Crim.P., following their convictions by a jury. The indictment charges the defendants, who were former partners in the now defunct securities firm of Baerwald & DeBoer, with multiple violations of federal criminal laws in connection with the registration and proposed public offering of the common stock of Xprint Corporation.

Count 1 charged that the defendants, together with George C. VanAken, conspired to defraud the United States and to violate federal securities and mail fraud laws. Counts 2 through 5 charged both defendants with having aided and abetted the filing of false

registration statements for violation of 15 U.S.C. §77x and 18 U.S.C. §2. Counts 6 through 8 charged the defendant DeBoer with three counts of having made false statements to the Securities and Exchange Commission ("SEC") in violation of 18 U.S.C. §1001. In Counts 9 through 12, both defendants were charged with four counts of mail fraud. Counts 13 through 16 alleged that the defendants used the mails to transmit a prospectus as to which no proper registration statement had been filed, in violation of 15 U.S.C. §§77e(b) and 77j.

At the close of the Government's case, the Court dismissed the conspiracy count finding that a reasonable minded jury could not conclude beyond a reasonable doubt that the defendants were guilty of the conspiracy as pleaded in Count 1 of this indictment. See United States v. Taylor, 464 F.2d 240 (2d Cir. 1972). In particular, the Court found that the Government's proof tended to show the existence of two conspiracies and this variance was fatal to the Government's case under Kotteakos v. United States, 328 U.S. 750 (1946). The Court also dismissed Counts 9 and 11, two of the mail fraud counts, because of a failure of proof as to the element of mailing.

The jury returned a verdict of guilty against DeBoer on Count 2 and acquitted him on all the remaining charges. The jury found the defendant Erb guilty on all the remaining counts with which he was charged.

George VanAken, a confessed stock swindler and a former partner in Baerwald & DeBoer, was the Government's chief witness. VanAken testified that he and Erb met with Earl Deimund, president of Xprint, Paul DeCoster, counsel for Xprint, and Conrad Schmitt in April 1969 to discuss Xprint's need to raise capital. VanAken and Erb expressed interest in participating in a private placement. VanAken and Erb asked if they would be able to purchase stock at nominal prices and Deimund told them that this would be possible. VanAken said that he would put the stock in his own name or that of Enoch VanAken, his father. Erb said that he would put the stock in his own name. Deimund mentioned that Xprint was in immediate need of short-term capital and asked if Erb, VanAken and Schmitt would guarantee a bank loan, which they agreed to do.

At the conclusion of this meeting, Deimund asked if VanAken and Erb would want to participate in a public offering of Xprint stock after the private placement had been accomplished.

Ultimately thereafter, Deimund on behalf of Xprint and VanAken for Baerwald & DeBoer entered into a memorandum of intent for the Baerwald firm to conduct a best efforts underwriting of Xprint's stock.

On April 22, 1969, VanAken and Erb met with Franklin DeBoer in DeBoer's office. They informed DeBoer that they were attempting to raise private capital for Xprint. They discussed Xprint Corporation's business, and the underwriting that was contemplated. VanAken asked DeBoer to invest \$10,000.00, which would entitle him to 5,000 shares at a \$2.00 price. VanAken and Erb had purchased their shares at a significantly lower price. VanAken told DeBoer that Xprint would go public at a price of \$7.00 or \$8.00 per share and that he could include 2,500 of his shares in the corporation's underwriting. DeBoer wrote a check for \$10,000.00 at this meeting.

DeBoer told them that they would have problems putting the shares in their own names since they were partners in the firm underwriting the public offering. DeBoer mentioned tax advantages and the possibility that these shares would push their compensation as underwriters above the limits considered appropriate by the National Association of Securities Dealers, Inc. ("NASD"). DeBoer

mentioned that he would take 11 shares in the name of James Lovelett.

In May 1969, VanAken and Erb met with Deimund and DeCoster. DeCoster told VanAken and Erb that if they took the stock in their own names they would violate the NASD rules barring excessive compensation to underwriters. VanAken said that he would substitute the name of Donald Sedgwick on his shares and Erb said he would use Scott Skillern.

The essence of the Government's charges is that Lovelett, Sedgwick and Skillern were nominees who had no interest in these shares of Xprint and the use of their names was merely to disguise the true ownership by DeBoer, VanAken and Erb. References to ownership by Lovelett, Sedgwick and Skillern are alleged to be materially false statements and are the predicate for the fraud counts.

I

Defendant Erb moves for a judgment of acquittal, pursuant to Rule 29(c), F.R.Crim.P., alleging that he was prejudiced by joinder in the indictment with the defendant DeBoer and the inclusion of the witness VanAken as an unindicted co-conspirator. Preliminarily,

the Court notes that improper joinder and the denial of a severance do not warrant the remedy afforded by Rule 29(c). Rather, a motion for a new trial, pursuant to Rule 33, F.R.Crim.P., would be the appropriate vehicle to raise these grounds. See C. Wright, 2 Federal Practice and Procedure §§466, 470, 556 (1969). The Court treats this branch of the motion as if made for a new trial pursuant to Rule 33.

Erb contends that joint trial with DeBoer caused him substantial prejudice. In particular, Erb contends that DeBoer alone was charged in Counts 6 through 8 for filing false statements with the SEC. Erb also contends that the sheer volume of exhibits and testimony admitted solely as to DeBoer necessarily prejudged the jury's consideration of the charges against him. At the close of the Government's case, and after the Court dismissed the conspiracy count, defendant Erb moved for a severance and mistrial. This motion was denied.

Stern v. United States, 409 F.2d 819 (2d Cir. 1969) governs the determination of this motion. There, the Court stated:

"It is well settled that the initial joinder of defendants is permissible under Rule 8(b) of the F.R.Crim.P. if the defendants are alleged to have participated in the same act or

transaction or in the same series of acts or transactions constituting an offense or offenses,' 18 U.S.C. Rule 8(b), unless the charge of a concert of action was included in the indictment in bad faith, because it was alleged without 'reasonable expectation that sufficient proof would be forthcoming at trial.' United States v. Aiken, 371 F.2d 294, 299 (2d Cir. 1967)." Id., 820.

In dismissing the conspiracy charge, the Court found specifically that joinder was made in good faith. We adhere to that finding. The charges in this indictment all arise from the proposed public offering of Xprint stock. Both defendants are alleged to have used nominees to obtain undisclosed profits. Each dealt with VanAken in effectuating similar means of achieving their criminal goals. A single prospectus and a single registration statement with its amendments contained the false representations alleged. The initial joinder was permissible and made in good faith.

After dismissal of the conspiracy count, separate trials are required only if "it appears that a defendant ... is prejudiced by a joinder of offenses or of defendants in an indictment ... or by such joinder for trial together." Rule 14, F.R.Crim.P. See Schaffer v. United States, 362 U.S. 511, 514 (1960); Stern v. United States,

supra; United States v. Catig . . . 3 F.2d 491, 495 (2d Cir. 1963).

In this case, there were only two defendants. Repeatedly, the Court gave limiting instructions as documents were admitted and testimony received. There were no meaningful occasions where there was confusion as to which defendant was being referred to in the testimony. In its charge to the jury prior to their deliberations, the Court instructed the jurors that guilt is personal and that they must reach separate verdicts as to each defendant on each count. The Court repeated its instruction that the testimony of Scott Skillern and testimony concerning Donald Sedgwick were received only against Erb and that the testimony of James Lovelett was received only against DeBoer and that the testimony of Antoinette Zombic was received only to enable the jury to determine if Lovelett was DeBoer's nominee. Counsel for Erb acknowledges forthrightly that the Court gave appropriate instructions, but suggests that the prejudice was incurable and that the jurors did not follow the Court's instructions.

Defendant also suggests that the sheer number of witnesses whose testimony was received only as to the defendant DeBoer, prejudiced his rights to a fair trial. The verdict belies this argument. Although a greater number of witnesses testified regarding

DeBoer's activities, the jury acquitted DeBoer on all but one count. There is no merit to the suggestion that the testimony of these witnesses had a prejudicial effect on Erb's case. Furthermore, Erb's own activities in regard to the Xprint offering were not so insubstantial as to require a severance to assure that he received a fair trial. See United States v. Cohen, ___ F.2d ___, Nos. 569, 570, 571 (2d Cir. June 26, 1975).

Erb was not prejudiced by his joint trial with DeBoer and his motion for a new trial is denied.

II

DeBoer--Sufficiency of Evidence

Defendant DeBoer moves for judgment of acquittal on the grounds that the evidence presented to the jury was insufficient for the jury to have found him guilty of having willfully made a false statement in the August 20, 1969 Form S-2 Registration Statement in violation of §24 of the Securities Act of 1933, 15 U.S.C. §77x. DeBoer contends that, as a matter of law, on the evidence presented at trial, the jury could not hold DeBoer criminally responsible for false statements made in a document which he did not prepare and over whose contents he had no control.

On a motion for judgment of acquittal after discharge of the jury, the Court must view the evidence in the light most favorable to the Government. United States v. Brooks, 349 F.Supp. 168, 171 (S.D.N.Y. 1972); C.Wright, supra, §465. Issues of credibility are questions that are within the domain of the jury and are not reached on this motion unless the testimony is so in conflict or improbable as to be rejected as a matter of law.

VanAken testified that on April 22, 1969 he and Erb met with DeBoer. During that conversation, they told DeBoer that a public offering was contemplated and that, if he purchased 5,000 shares, he might offer 2,500 shares at the offering price in the underwriting. DeBoer purchased the shares, but said that there would be problems if he took the shares in his own name because, among other reasons, Baerwald & DeBoer would be acting as underwriters in the offering, and since he was a partner of that firm, the profits on the sale of his shares would violate NASD prohibitions against excessive underwriter's compensation. DeBoer purchased the shares for issuance in the name of James Lovelett. (Trial Tr. pp. 74-75).

Government's Exhibit 104 reads: "VanAken, where is my

stock that I paid \$10,000.00 for?" VanAken testified that when he received this note in early May of 1969 he went to DeBoer's office and told him that the stock had not been issued yet. VanAken offered to take care of the matter for DeBoer and DeBoer agreed. (Trial Tr. pp. 91-92).

VanAken also testified that in the middle of January, 1970, he met with DeBoer. DeBoer complained that the Xprint underwriting had been cancelled and that he stood to lose \$10,000.00 without even the benefit of an income tax loss because the shares were in Lovelett's name. (Trial Tr. pp. 155-56).

James Lovelett testified that he never purchased or received shares in Xprint. He testified that he did not discuss Xprint with DeBoer nor did DeBoer ever tell him that DeBoer had purchased shares in Xprint for him. Lovelett did not know that Xprint shares had been issued in his name (Trial Tr. pp. 343-45). Furthermore, evidence showing transactions between bank accounts in the names of Lovelett and Antoinette Zombic, persons who did not know each other, tended to show DeBoer's use of Lovelett as a dummy. Clearly, there was substantial evidence, which if believed, warranted the jury's finding that Lovelett was DeBoer's nominee.

DeBoer contends that even so he could not be held criminally liable for false statements fraudulently concealing his true interest in the underwriting. The Government did not contend that DeBoer had prepared the registration statement, but charged him in this count as an aider and abettor.

For a defendant to be convicted as an aider and abettor, "it must be proved that the defendant consciously assisted the commission of the specific crime in some active way." United States v. Dickerson, 508 F.2d 1216, 1218 (2d Cir. 1975). In the instant case, DeBoer proposed the use of Lovelett as a nominee and told VanAken to have DeBoer's shares issued in his name, knowing and intending that this false information would be transmitted to the attorneys for inclusion in the registration statement and prospectus. (By identifying Lovelett as the owner of the shares and listing him as the selling shareholder, DeBoer caused the attorneys to file a false statement.

United States v. DeLaMotte, 434 F.2d 289, 293 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971) holds that

"criminal intent must exist in the minds of both the principal and the aider or abettor [United States v. Penn, 131 F.2d 1021 (2d Cir. 1942)], although the accessory is liable for any criminal

act which, in the ordinary course of events, was the natural or foreseeable consequence of the crime that he advised or committed."

DeBoer was not a novice in securities matters. The brokerage and investment banking firm of Baerwald & DeBoer bore his name. VanAken told DeBoer that Xprint would be making a public offering of its common stock, and that he would be able to sell 2,500 shares in that offering. As is apparent from DeBoer's anger when the Xprint underwriting was cancelled, these were material elements in DeBoer's decision to purchase the stock he was offered. DeBoer knew that if a public offering were to be made that a registration statement would be filed and that the registration statement would disclose the identities of the selling shareholders and the terms of the underwriter's compensation. It was a natural or foreseeable consequence of his scheme to have the shares issued in the name of his nominee that the attorneys would be caused to make material false statements in the registration statement filed in connection with the proposed public offering, specifically, that an aspect of the compensation attributable to him would be undisclosed.

DeBoer cannot escape criminal liability as an aider and abettor because he did not personally prepare and file the

document that contained his false statements. See United States v. Wolfson, 437 F.2d 862, 878 (2d Cir. 1970). In United States v. Clearfield, 358 F.Supp. 564 (E.D. Pa. 1973), the court denied defendant's motions for a new trial and arrest of judgment of conviction for violations of the false statements provisions of 18 U.S.C. §1001, finding criminal liability under an aider and abettor theory where defendant induced trade contractors to make false certifications to the Department of Housing and Urban Development. The court found that the

"[d]efendant ... knowingly and willfully caused each of the certifications to be submitted to FHA. Such conduct makes defendant punishable as a principal within the meaning of 18 U.S.C. §2(a), for he induced and procured the making of false certifications by others. It may also be said that defendant willfully caused false certifications to be made by others, the making of which by him personally would have been a violation of law, making him punishable as a principal under 18 U.S.C. §2(b) as well." Id., at 578-79.

The fact that DeBoer knowingly and willfully made these false representations to VanAken when he knew or should have known, and intended that they would be included in a registration statement, is sufficient grounds upon which to predicate criminal liability under an aider and abettor theory.

DeBoer--Venue and Statute of Limitations

This indictment was filed by a grand jury in the Southern District of New York on August 19, 1974. Defendant DeBoer argues in the alternative either that (1) prosecution was commenced after the applicable five-year limitations period had expired; or (2) venue was improperly laid in this District. DeBoer contends that if the criminal act which he committed as an aider and abettor consisted of false statements that he made to VanAken, the crime occurred prior to August 19 or 20, 1969, outside the limitations period. If the crime consisted of the filing of the registration statement containing the false statement on August 20, 1969, within the limitations period, then the criminal act was not committed in New York.

The Government urges this Court to find that DeBoer waived his objections to venue by moving for a judgment of acquittal on specific grounds at the close of the Government's case without including among his objections the allegedly improper venue, United States v. Rivera, 388 F.2d 545 (2d Cir.), cert. denied, 392 U.S. 937 (1968); C. Wright, 2 Federal Practice and Procedure §466 (1969). Prior to trial, the Court denied DeBoer's motion,

made pursuant to Rule 12, F.R.Crim.P., to dismiss Counts 5 through 8 for improper venue.

In Rivera, the defendant did not raise the issue of venue until his appeal although he had moved for judgment of acquittal in the district court on specific grounds. See also, Gilbert v. United States, 359 F.2d 285 (9th Cir.), cert. denied, 385 U.S. 882 (1966). We are not prepared to extend the holding of Rivera to find waiver for purposes of a Rule 29(c) motion where the defendant has moved pursuant to Rules 12 and 29(a) without specifying his objection to venue. Although it is preferable that objections to venue be raised early in the proceedings, we do not find a waiver of the defendant's rights under Article III, §2 of the Constitution based upon any technical failure of the defendant to include this objection in a Rule 29(a) motion during trial when it is raised in a timely Rule 29(c) motion. See generally United States v. Mischlich, 310 F.Supp. 669 (D.N.J. 1970).

The determination of the issues of venue and the statute of limitations which the defendant raises rest upon an analysis of the crime charged in §24 of the Securities Act of 1933, 15 U.S.C. §77x. Section 24 reads in relevant part:

"[A]ny person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading"

commits a crime.

In determining venue, the "statutory key verbs" defining the offense control. United States v. Slutsky, 487 F.2d 832 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1974). See also United States v. Battenhausen, 499 F.2d 1223, 1226 (10th Cir. 1974) (Clark, J.) United States v. Hagan, 306 F.Supp. 620, 621-22 (D. Md. 1969); C.Wright, 1 Federal Practice and Procedure §302 (1969). The key verb in this statute is "makes" any untrue statement. DeBoer made the false statements, later included in the registration statement, in conversations with VanAken in New York. The essence of the offense is the making of an untrue statement in a registration statement, not the filing of that registration statement. As in United States v. Slutsky, supra, venue properly lies in this District where the false statements were made, although the registration statement was ultimately filed in Washington, D.C.

The language of 15 U.S.C. §77x distinguishes the offense being charged in Count 2 of this indictment from the offense charged in

Travis v. United States, 364 U.S. 631 (1961). In Travis, the Court, analyzing the predecessor statute of 18 U.S.C. §1601 in its relation to a provision of the National Labor Relations Act requiring union officials to file non-Communist affidavits, concluded that the essence of the offense was filing a false affidavit with the National Labor Relations Board. The language of the statutes involved there more readily admitted of a construction emphasizing the filing element. See also United States v. Griesa, 481 F.2d 276, 284 n.10 (Timbers, J. concurring opinion construing 15 U.S.C. §§781 and 78m).

Moreover, the making of an untrue statement in a registration statement comes within the purview of the continuing offense statute, 18 U.S.C. §3237. The offense is begun when a false statement is willfully made, knowing that it would be included in a registration statement. The crime is completed only when a registration statement containing this false statement is filed with the SEC. Compare United States v. Slutsky, *supra*, with United States v. Rodriguez, 465 F.2d 5 (2d Cir. 1972).

Assuming, solely for purposes of argument, that the crime was committed in the single act of filing the registration statement

in Washington, D.C., nevertheless venue in this District is proper. Venue is properly laid in either the district in which the defendant committed the accessorial acts or the district in which the crime occurred. United States v. Piazza, 365 F.2d 206 (2d Cir. 1966). DeBoer's use of Lovelett as a nominee, and his arrangements with VanAken to conceal his true ownership of the Xprint shares were accessorial acts committed in this District.

Venue in this District was proper. However, contrary to DeBoer's contentions, this does not mean that prosecution commenced after the limitations period had expired.

"Statutes of limitations normally begin to run when the crime is complete." Pendergast v. United States, 317 U.S. 412, 415 (1943); Toussie v. United States, 397 U.S. 112, 115 (1970). As we noted earlier, the offense defined by 15 U.S.C. §77x was not complete until the filing of the registration statement, which in this case occurred on August 20, 1969. The offense was a continuing one whose duration extended in time from the time of the making of the false statements with knowledge that the attorneys would be caused to include these misstatements in a registration statement until the registration statement is filed with the SEC. The filing

of the registration statement is a necessary element which must be satisfied for the crime to have been committed. Although DeBoer devised a scheme to disguise his ownership of the shares, and effectuated this scheme in arrangements with VanAken, no crime under 15 U.S.C. §77x would have been committed if a registration statement had not been filed. Viewing this offense as a continuing but incomplete offense of this limited duration in no way offends the policies enunciated in Toussie v. United States, supra, that criminal limitations statutes be liberally construed in favor of repose, and that a statute not be construed as creating a continuing offense unless the language of the statute requires that result.

The Government contends that since DeBoer was prosecuted under an aider and abettor theory, the limitations period began to run only when the principal committed the crime. The Government argues that this result necessarily flows from the rule that to convict an aider and abettor, the Government must prove that a crime has been committed. United States v. Deutsch, 451 F.2d 98 (2d Cir. 1971). The Government hypothesizes that if the limitations period commenced with the occurrence of the accessorial acts, it would be possible for the limitations period to expire before prosecution could commence.

The Government further contends that since an accessory is liable for any criminal act which was the natural or foreseeable consequence of the crime that he advised or committed, if the criminal act occurred within the limitations period, then prosecution is not barred although he had not committed an act in furtherance of the criminal venture more than five years before the date on which the indictment was returned. A defendant may be convicted on a charge of conspiracy although he did not commit an overt act within the limitations period if co-conspirators did commit such acts and the defendant had not withdrawn from the conspiracy. United States v. Brasco, 516 F.2d 816 (2d Cir. 1975); United States v. Portner, 462 F.2d 878 (2d Cir.), cert. denied, 409 U.S. 933 (1972).

DeBoer introduced evidence at trial which showed that in the Summer and Fall of 1969 he was in the process of dissociating himself from the firm of Baerwald & DeBoer, although he did not thereby dissociate himself from the Xprint criminal venture he had set in motion. The jury properly acquitted DeBoer on those counts which charged him with committing criminal acts in October and December 1969.

Adopting the Government's application of the statute of

limitations could result in the prosecution of stale charges and in prejudicing the defendant's ability to defend against these accusations. See United States v. Marion, 404 U.S. 307 (1971) and 404 U.S. 307, 326 (Douglas, J. concurring opinion). The accessorial conduct charged in this indictment occurred in the Spring of 1969, five years and three or four months prior to DeBoer's indictment; trial commenced on April 21, 1975, after disposition of defendants' pre-trial motions. No prejudice to the defendant's speedy trial or due process rights by reason of this delay in commencing prosecution is alleged here.

The Court need not reach the Government's argument that the limitations period commences from the date of the principal's crime although the accessorial acts were committed outside the limitations period because of our finding that the offense was a continuing offense, not completed until the date of filing. In finding that this prosecution was not time barred, we neither adopt nor reject the Government's theory.

The motions are denied.

So Ordered,

Dated: New York, New York
September 5, 1975

CHARLES L. BRIANT, JR.
CHARLES L. BRIANT, JR.
U. S. D. J.

JUDGMENT AND PROBATION/COMMITMENT ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
UNITED STATES OF AMERICA,

v.

Docket No. 74 Cr. 818 CLB

CHARLES D. ERB,

Defendant.

-----X

In the presence of the attorney for the government
the defendant appeared in person on 3-11-76 with counsel
Edward M. Shaw.

PLEA NOT GUILTY

There being a verdict of GUILTY

Defendant has been convicted as charged of the
offense(s) of making untrue registration statements. (Title
15, U.S. Code, Section 77x; Title 18, U.S. Code, Section 2.);
using the mails in a scheme and artifice to defraud. (Title
18, U.S. Code, Section 1341.); making use of means and instru-
mentalities of interstate commerce and the mails to carry and
transmit a prospectus which did not meet the requirements of
the Securities Act of 1933. (Title 15, U.S. Code, Sections
773(b) and 77j; Title 18, U.S. Code, Section 2.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and order that: The defendant is hereby committed to the custody of the Attorney General or his duly authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS on counts 2, 3, 4, 5, 12, 13, 14, 15 & 16, to run concurrently with each other.

Imposition of sentence on count 10 is suspended. Defendant is placed on probation for a period of THIRTY-ONE (31) MONTHS, subject to the standing probation order of this Court.

Special condition of probation being that the defendant not deal in any publicly traded securities without first obtaining permission of his probation officer.

Defendant is continued on his present bail until March 15, 1976 at 5 p.m. at which time defendant is to have posted bail pending appeal fixed in the amount of \$5,000.00 Unsecured Personal recognizance Bond.

Signed by

United States District Judge

Charles L. Brieant, Jr.

JUDGMENT AND PROBATION/COMMITMENT ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
UNITED STATES OF AMERICA,

v.

Docket No. 74 Cr. 818 CLB

FRANKLIN S. LE BOER,

Defendant.

-----X

In the present of the attorney for the government
the defendant appeared in person on 3/11/76 with counsel
Gary P. Naftalis.

PLEA NOT GUILTY

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s)
of making untrue registration statements. (Title 15, U.S. Code,
Section 77x; Title 18, U.S. Code, Section 2.)

The Court asked whether defendant had anything to
say why judgment should not be pronounced. Because no suffi-
cient cause to the contrary was shown, or appeared to the court,
the court adjudged the defendant guilty as charged and convicted
and ordered that: The defendant is hereby committed to the
custody of the Attorney General or his authorized representative

for imprisonment for a period of THREE (3) YEARS on count 2 pursuant to Section 3651 of Title 18, U.S. Code, as amended, with provision defendant be confined in a JAIL type institution for a period of FIVE(5) MONTHS as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and the defendant is placed on probation for a period of THIRTY-ONE (31) MONTHS, to commence upon expiration of confinement, subject to the standing probation order of this Court. Defendant is FINED \$5,000.00 on count 2.

Special conditions of probation being that the defendant pay the fine and not deal in any publicly traded securities without first obtaining permission of his probation officer.

Defendant continued on present bail until March 15, 1976 at 5 p.m. at which time defendant is to have posted bail pending appeal fixed in the amount of \$5,000.00 Unsecured Personal Recognizance Bond.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during

the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Signed By

United States District Judge

CHARLES L. BRIEANT, JR.

Date 3-11-76

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

- against -

No. 75 Cr. 818 (CE)

CHARLES ERB,

Defendant-Appellant.

-----X

S I R S :

PLEASE TAKE NOTICE that the defendant, Charles Erb, hereby appeals from the judgment and sentence rendered on March 11, 1976, in the United States District Court for the Southern District of New York (Brieant, D.J.), wherein he was convicted, after jury trial, of conspiracy, mail and securities violations (15 U.S.C. §§77 of (a), 77s(a), 77x; and sentenced to a term of 18 months in prison concurrently, on each count on which he was convicted and from and every part thereof.

Dated: March 19, 1976
New York, New York

Yours, etc.

EDWARD M. SHAW
Attorney for Defendant-
Appellant Charles D. Erb
522 Fifth Avenue
New York, New York 10036

TO:

Clerk
United States District Court
Southern District of New York

HON. ROBERT FISKE
United States Attorney
Southern District of New York
Attention: AUSA Lowe

The defendant's home address is 105 White Oak Ridge Road, Short
Hills, New Jersey 07078

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-against-

74 Cr. 818 (CLB)

FRANKLIN S. DeBOER,

Defendant.

-----X

Notice is hereby given that the defendant FRANKLIN S. DeBOER hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment of conviction entered on the 11th day of March, 1976.

Dated: New York, New York
March 22, 1976

ORANS, ELSEN & POLSTEIN
One Rockefeller Plaza
New York, New York 10020
(212) JU 6 - 2211
Attorneys for Defendant
FRANKLIN S. DeBOER

Deft:

3001 South Course Drive
Pompano Beach, Florida

U.S. Asst: John Lowe

By: /s/ Gary P. Naftalis

COPY RECEIVED
JUN 15 1976
ROBERT B. FISKE JR.
U.S. DISTRICT COURT
SO. DIST. OF N. Y.